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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 41

C. E. STEVENS COMPANY, C. E. STEVENS TACOMA COMPANY AND C. E. STEVENS COMPANY OF OREGON, PETITIONERS,

vs.

FOSTER & KLEISER CO., GEORGE W. KLEISER, P. FOSTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1940.

CERTIORARI GRANTED MAY 6, 1940.

SUPREME COURT OF THE UNITED STATES

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation,

Plaintiffs,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS; and GEORGE SMITH,

Defendants.

SECOND AMENDED COMPLAINT

Action for Damages Under Act of Congress Approved July 2, 1890, Sherman Antitrust Act.

Plaintiffs, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon, complain of defendants, and allege for their causes of action:

First Count

I.

That plaintiff, C. E. Stevens Company, is now, and ever since March 8, 1924, and at all times herein mentioned has been, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business located at Seattle, King County, State of Washington. That ever since the said date plaintiff has been engaged in the business of outdoor advertising in said State of Washington and other states of the United States, and has been at all times engaged in interstate commerce between the various states of the United States, as will more fully appear hereinafter. [2]

II.

That plaintiff alleges that the C. E. Stevens Company is the parent company, and that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are subsidiaries of the parent company, functioning principally as branch offices of the parent company, and that plaintiff, C. E. Stevens Company, owns over 85% of the common voting stock of plaintiffs, C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon, respectively; that C. E. Stevens and Roy S. Marshall own the majority of the common voting stock of the plaintiff, C. E. Stevens Company; that C. E. Stevens and Roy S. Marshall control and manage the busi-

ness activities of all three plaintiff companies, and that all business activities relating to the C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are directed through the C. E. Stevens Company; and that C. E. Stevens and Roy S. Marshall are the president and vice-president, respectively, of all three plaintiff companies.

That plaintiff company has at all times mentioned herein engaged in the outdoor advertising business, that is to say, has been engaged in the solicitation of, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States. That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the designs or stencils upon billboards by paint panels supplied by the plaintiff company. That [3] it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboards or paint panels and, in many

cases, that they be placed or painted upon certain specified billboards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States to another state solely to be placed upon a stated number and class of billboards and, in many cases, to be placed upon certain specified billboards, which are the property or within the control of the plaintiff company, and are at all times within the contemplation of the parties to the said contracts. That in execution of the said contracts the said designs, stencils and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels, which are the property of or within the control of the plaintiff company, and are at all times within the contemplation of all the parties to the said contracts. That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from the said designs or stencils are placed or painted upon the pre-determined and stated number and class of billboards or paint panels, as aforesaid, the primary consideration for each entire contract has not been

performed and each said contract remains executory and incomplete. That by thus engaging in the outdoor advertising business the said plaintiff company has been and is engaged in [4] interstate commerce between the several states of the United States.

III.

That defendant Foster & Kleiser Co., is a corporation organized and existing under the laws of the State of Nevada, and duly authorized and qualified to engage in business in the States of Oregon, Washington, California and Arizona, and at all times herein mentioned was engaged in the business of outdoor advertising in the said States of Oregon and Washington, California and Arizona, and other states of the United States, that is to say, has been engaged in the solicitation, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States. That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the said designs or stencils upon billboards or paint panels supplied by the said de-

fendant company. That it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboard or paint panels and, in many cases, that they be placed or painted upon certain specified billboards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States [5] to another state solely to be placed upon a stated number and class of billboards and, in many cases, to be placed upon certain specified billboards, which are the property or within the control of the said defendant company, and are at all times within the contemplation of the parties to the said contracts. That in execution of the said contracts the said designs, stencils and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards, or paint panels, which are the property of or within the control of the said defendant company and are at all times within the contemplation of all the parties to the said contracts. That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from

the said designs or stencils are placed or painted upon the pre-determined and stated number and class of billboards or paint panels, as aforesaid, the primary consideration for each entire contract has not been performed and each said contract remains executory and incomplete. That by thus engaging in the outdoor advertising business the said defendant company has been engaged and is engaged in interstate commerce between the several states of the United States. That said defendant, Foster & Kleiser Co., has its principal place of business in the City of San Francisco, and branch offices at Seattle and Tacoma, State of Washington; Portland and Medford, State of Oregon; Oakland, Los Angeles, Sacramento, Fresno, Long Beach and San Diego, State of California; Chicago, State of Illinois; and New York City, State of New York.

That George W. Kleiser, its president, is a citizen of [6] the United States and a resident of San Francisco, State of California.

That Walter P. Foster, its vice-president, is a citizen of the United States and a resident of San Francisco, State of California.

That Albert Mortenson, its treasurer, is a citizen of the United States and a resident of San Francisco, State of California.

That Gilman Haynes, its general lease manager, is a citizen of the United States and a resident of San Francisco, California.

That Restop Realty Co. is a corporation organized and existing under and by virtue of the laws of the State of California, and is qualified to do business in the State of Washington, and is and was at all times mentioned herein, engaged in the business, among other things, of owning, holding and leasing real property and outdoor advertising sites in and among the Pacific Coast States of Oregon, Washington, California and Arizona, including the cities of Seattle, and Tacoma, Washington, and Portland, Oregon. That more than 50% of the voting stock of the said defendant, Restop Realty Co., is owned and controlled by the defendant corporation, Foster & Kleiser Co., and the officers and directors of the said defendant corporation, Foster & Kleiser Co. That defendant, Foster & Kleiser Co., and the officers and directors of said Foster & Kleiser Co. have been and at all times herein mentioned were in control and domination of said defendant, Restop Realty Co., and have at all times herein mentioned been and now are the motivating force of all acts of said defendant, Restop Realty Co.

That defendant Gerald E. O'Neil, its Seattle Branch office manager, is the statutory agent for said Restop Realty Co. in [7] the State of Washington. That Gerald E. O'Neill is a citizen of the United States and a resident of Seattle, Washington.

That Lyle Abrahamson, its Tacoma Branch office manager, is a citizen of the United States and a resident of Tacoma, State of Washington.

That Paul Dueber, its Portland Branch office manager, is a citizen of the United States and a resident of Portland, State of Oregon.

IV.

That for many years last past, and up to and including the date of the filing of the original complaint herein, Foster & Kleiser Co. has been continuously engaged in the business of outdoor advertising, as heretofore defined and explained. In conducting this business Foster & Kleiser Co. and Restop Realty Co. have owned and leased parcels of real estate in desirable locations in cities, towns and rural districts throughout the states of Washington, Oregon, California and Arizona, which states are hereinafter collectively referred to as the Pacific Coast Area. They have erected and maintained on said parcels of real estate numerous structures of wood and metal designed to display advertisements.

Great numbers of such advertisements have been in the form of lithographs which have been pasted or otherwise affixed to the face of said structures. These lithographs have been manufactured or printed by certain individuals, firms and corporations, hereafter referred to as lithographers, located in states other than those which comprise the

Pacific Coast Area, principally in the states of Kentucky, Ohio and Illinois. Said Foster & Kleiser Co. has been soliciting and entering into many thousands of contracts for the display of advertising matter upon said structures with persons, firms and corporations located [8] throughout the United States, and hereinafter referred to as advertisers, desirous of promoting the sales of their respective goods, wares and merchandise throughout the Pacific Coast Area. For the most part said advertisers have been located in states other than those comprising the Pacific Coast Area and are too numerous otherwise to identify herein. Many thousands of such contracts and arrangements have been made and are now being performed between Foster & Kleiser Co. and said advertisers for the shipment and transportation of lithographs from said lithographers to the said branches maintained as aforesaid by Foster & Kleiser Co. throughout the Pacific Coast Area, for the primary purpose of placing the said lithographs upon a stated number and class of billboards and, in many cases, of placing the said posters or lithographs upon certain specified billboards, as aforesaid. Pursuant to said contracts and arrangements, many thousands of lithographs have been and are being shipped and transported by said lithographers or advertisers located in places other than those comprising the Pacific Coast Area to the said branches maintained by Foster & Kleiser Co. throughout the Pacific Coast Area for the primary purpose of placing the said posters or lithographs

upon a stated number and class of billboards, and, in many cases, of placing the said posters or lithographs upon certain specified billboards, as aforesaid. Large numbers of said advertisements have been painted directly on the face of the billboards or paint panels through the medium of designs or stencils shipped from one of the states of the United States to another state for the primary purpose of being used to place the said advertisements upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels, as aforesaid. [9]

V.

The work done under contracts with advertisers for bill-posting in the city or town in which the advertisers are located is known as "local work."

The work done under contracts between advertisers and bill-posters in various localities, either in the same state or in different states from that in which the advertiser does business, is known as "national work."

National work is in most instances done for the advertisers located in a different state or country from that in which the posting work is done. Both national and local work usually involve the sending of the posters in interstate or foreign commerce.

From about the year 1902 up to and including the date of the filing of the complaint in this action, a number of persons, firms and corporations, includ-

ing Foster & Kleiser Company, have been continuously engaged in the business of operating outdoor advertising plants, as aforesaid.

Persons, firms and corporations thus engaged are referred to herein in this second amended complaint, and in the trade, as "plant owners."

The operation of outdoor advertising plants includes the maintenance of two kinds of plants, (1) a poster plant, and (2) a paint plant.

A poster plant consists of a system of billboards or poster panels, either built as separate structures or attached to buildings, walls, fences or other structures, under common ownership, and used for the sole purpose of exhibiting thereon outdoor advertising posters or lithographs which are transported in interstate commerce.

For the purpose of contracting for advertising displays, [10] poster boards or panels, are arranged in groups consisting of substantially an equal number of illuminated and unilluminated boards distributed throughout a particular city or town, or in a particular section of a city or town, which group is referred to as a "showing."

A "showing" is intended to provide an outdoor advertising display in substantially all places available and desirable in a particular city, town, or village having advertising value. Showings are subdivided into full, half or quarter showing, depending upon whether the advertiser contracts for a display on all of the panels of a particular group of panels, or a half or a quarter thereof.

The usual and customary sales unit for poster advertising is a quarter showing which represents a definite number and class of billboards or poster panels.

A paint plant consists of a system of one or more signboard panels, or bulletin boards, either built as separate structures, or attached to building walls, fences or other structures, under common ownership, and used for the purpose of painting thereon designs or copy for outdoor advertising matter which are transported in inferstate commerce. Each separate board or panel is usually located at some conspicuous point near a public highway, by which traffic is continually passing.

The structures comprising a plant in practically all instances are located upon property leased by the plant owner at a rental much less than the rental value of the property for other than advertising purposes.

Advertising leases usually and customarily contain a provision that if the property is sold or is leased or used for other than advertising purposes the advertising lease may be cancelled. [11]

Persons, firms and corporations who solicit outdoor advertising contracts, and perform the activities in connection therewith, hereinafter set forth, are referred to and called in the trade "advertising agencies." Said persons, firms and corporations are hereinafter referred to in this second amended complaint as "agencies".

Contracts for the execution of outdoor advertising displays are secured from advertisers by solicitation by plant owners, by agencies, and by national solicitors appointed by the Trade Association hereafter referred to.

When secured by agencies they are executed upon the plants of plant owners throughout the territory to be covered; when secured by plant owners the portion of said contract to be executed upon the plant of the plant owner securing the contract is executed by such plant owner and the remainder is placed for execution upon the plants of others. This is called in the trade "sub-letting." A commission is paid to agencies by the plant owners on business secured from such agencies and to other plant owners on sublet business. When secured by national solicitors, they are executed exclusively on association plants as hereafter described.

VI.

The solicitation of outdoor advertising contracts involves:

(a) The preparation and submission to advertisers of advertising copy or designs by reproduction, either in print or in paint on signboards, walls, or panels constructed for that purpose;

(b) The procurement from lithographers, and the submission to advertisers, of estimates covering the cost of printing posters; [12]

(c) The procurement primarily through the association or associations hereafter mentioned,

from poster plant and paint plant operators of statistical information concerning the location of poster plants and paint plans in the various towns, and cities throughout the United States, as well as the charges for displays thereon, and the submission to prospective advertisers of estimates of the cost of displaying advertising matter on such plants;

(d) Entering into the contracts, either as principal or as agent for the advertiser, for the purchase of advertising posters pursuant to copy or designs approved by the advertiser, and the subsequent transportation and delivery of the same in interstate commerce from the lithographer to the operators of poster plants located in cities, towns and villages throughout the United States consigned to a stated number and class of billboards and/or paint panels, and, in many cases, to certain specified billboards and/or paint panels for posting in accordance with the instructions of the advertiser;

(e) Entering into a contract, either as principal or as agent for the advertiser, with operators of poster plants and paint plants, for the display of poster and painted advertising matter which is to be transported in interstate commerce in accordance with the advertiser's instructions;

(f) Causing the approved copy or designs for painted signs to be transported in interstate commerce from the office or studio of the advertiser or his agent, to operators of paint plants in the various cities and towns throughout the United States consigned for reproduction on a stated number and

class of paint panels, and, in most cases, on certain specified paint panels, in accordance with the advertiser's directions;

(g) Checking and inspecting the displays of advertising [13] matter on the poster and paint plants which have been selected by the advertiser or by the solicitor on its behalf;

(h) Making payments to the operators of the poster plants and the paint plants for the use of their plants; and

(i) Collecting from the advertisers for all services rendered.

The posting of a bill or poster upon a billboard involves three different parties and two different transactions; usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use. The advertiser then either personally, or through the agency, contracts with the plant owners in the localities which the advertiser desires to reach for the placing of these posters upon a stated number and class of billboards, and, in many cases, upon certain specified billboards. The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants. The lithographer usually is located in a different state from the advertiser who employs him to prepare the posters. Both the advertiser and the lithographer are usually located in different states

from the plants upon which the posters are placed.

Sometimes lithographers of their own initiative prepare a form of poster to be used generally by numerous advertisers in a certain line of business. In such cases large numbers of these posters are printed in exactly the same form. A blank space is left on each poster for the insertion of the individual name, etc., of each particular advertiser purchasing the poster. These are called in the trade "stock posters."

The cost of having a special design for a poster is so [14] large as to make the cost of each poster almost prohibitive when that expense is distributed only among a small number of persons, firms or corporations. Small advertisers, therefore, find it greatly to their advantage to buy these stock posters. Stock posters are purchased by local plant owners and by advertisers located in every state of the United States and elsewhere, from lithographers located at various points in the United States. They are usually purchased for use in one locality only.

VII.

The defendant, Foster & Kleiser Co., prior to the year 1915 was engaged in the outdoor advertising business, as heretofore defined and explained, principally in the states of Oregon and Washington. In the year 1915, said defendant expanded said business of outdoor advertising into the State of California. At about the time of expanding into California, said Foster & Kleiser Co. formulated and

entered into a plan, scheme and conspiracy with divers and sundry other persons, firms and corporations whose names, except as hereinafter alleged, are to the plaintiff company unknown, but whose names are known to said Foster & Kleiser Co., defendant herein.

VIII.

The purpose and object of said plan, scheme and conspiracy was to attempt to monopolize and by various acts and means taken individually, in concert with the organizations and by and through the means and methods hereafter set forth, to monopolize in the Pacific Coast Area all branches of the outdoor advertising business, which business has hereinabove been described and particularly to prevent plaintiff and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or [15] local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities whereby said independent plant owners could furnish a satisfactory advertising service to advertisers. Wherever used in this complaint, the terms "independents," "independent plant owners," "independent plants" and "independent companies"

include and are intended to embrace the appropriate plaintiff company.

The general plan, scheme and conspiracy was to effect such monopoly by:

1. Monopoly of the business of national outdoor advertising at its source through control of the agencies and organizations selling the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained by the plaintiff company and other competitiors, by means of various unfair, predatory and illegal acts more fully set forth hereinafter in paragraph XV.

IX.

The defendant, Foster & Kleiser Co., at all times from and after its organization, has been continuously and now is furthering and carrying out said plan, scheme and conspiracy.

All the acts, occurrences and facts hereinafter set forth were done and performed by said defendant, Foster & Kleiser Co., and Restop Realty Co., and their agents and employees, for the purpose of furthering, carrying out and completing said plan, scheme and conspiracy. [16]

X.

The "Association" herein referred to is the Outdoor Advertising Association of America, Inc., a corporation. Said Association is a consolidation of the following corporations:

1. The Associated Bill Posters and Distributors of the United States and Canada, which was a corporation organized under the laws of the State of New York in 1897. In 1906 the name of the said association was changed to the Associated Bill Posters and Distributors of the United States and Canada. In 1912 it was again changed to Poster Advertising Association, Inc. It was an association of poster plant owners, and its functions and purposes are hereinafter more particularly described.

2. The Outdoor Advertising Association of America, which was an association of paint plant owners organized prior to the year 1916, the exact date of which is unknown to plaintiff, but is known to defendant.

On or about March 25, 1927, the said associations were consolidated under the name of Outdoor Advertising Association of America, Inc., and said corporation, Outdoor Advertising Association of America, Inc., has been and now is the incorporated association of the paint plant operators and the poster plant operators.

The memberships in these associations, did, before consolidation, and do now, consist of separate display plants located in separate cities, towns and villages throughout the United States, including the

Pacific Coast Area. There is only one membership for each separate city, town or village. Voting in the affairs of the association, prior to consolidation was, and since consolidation is according to the number of separate display plants owned or operated by the voting members. [17]

Foster & Kleiser Co. has at all times since it has been engaged in the business of plant ownership and operation, exclusively operated association plants. Membership in the said association and associations is termed or demnominated a franchise. Foster & Kleiser Co. has held the exclusive franchise in the cities, towns and villages in which it has operated its plants on the Pacific Coast during all the time that it has been engaged in the business. As its business increased, due to the acquisition of other plants, by purchase as hereinafter alleged, it finally acquired some six hundred (600) plants, each having membership in said association or associations on the Pacific Coast, and thus acquired the asociation membership or franchises in all the Pacific Coast Cities, towns and villages, save and except the towns of Richmond and Modesto, Imperial County, California; and Spokane, Washington, and it became, was and is the second largest franchise holder in said association and associations in the United States.

Plants whose owners hold a franchise or membership in these associations are referred to in the trade, and hereafter in this complaint as "association plants." Other plant owners are referred to in

the trade, and hereafter in this complaint, as "Independent plants," and sometimes as "opposition plants."

The said conspirators, by and through action of said association, threatened to refuse and did, in fact, refuse to post lithographs if the manufacturers of said lithographs sold or furnished lithographs for posting upon independent plants or if said lithographers furnished samples of posters to independent plants. Said action of the conspirators and of said association was taken for the purpose of coercing and intimidating, and it did, in fact, coerce and intimidate lithographers and was for the further purpose of hampering and preventing [18] independent plant owners, including the plaintiff, and other competitors of the association plants and of the conspirators from securing samples of lithographs and posters, and of securing lithographs and posters; that thereby the said independents were obstructed and hindered in their business, and prevented from giving a full and adequate outdoor advertising service to their customers, competition with the association members and said conspirators was hindered and obstructed, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.

By and through said association or associations, advertisers were intimidated by the said association plants and the said conspirators, in that the said

association plants and the said conspirators threatened to, and did, in fact, refuse to post the posters and lithographs for advertisers if the said advertisers patronized or made contracts with independent plants for the display of their advertising.

The said association or associations limited the number of members in such association or associations so that there should be, was, and there is, but one poster plant, and one paint plant membership or franchise in each city, town or village of the United States, thereby preventing potential and actual competitors of the association members and the said conspirators from making use of the facilities provided by the association, from receiving the benefits of membership in the association, from competing with the association plants and the conspirators on equal terms, and preventing said independent plants, including the plant of the plaintiff from making use of the facilities provided by the association, to publish to advertisers and agencies statistical data concerning independent plants, including the [19] plant of the plaintiff, which publication is essential to obtain contracts for displays of national outdoor advertising.

At all times herein mentioned down to the date of filing the complaint herein, the said associations, association plants and said conspirators refused to execute any portion of contracts for outdoor advertising, any part of which had been or was to be executed upon an independent plant; refused to sublet any outdoor advertising which could not be executed

by the association plant owner securing the contract to an independent plant; refused to execute or accept the subletting of any part of a contract for outdoor advertising secured by an independent plant, whereby the said independents, including the plaintiff, were and are hampered and restricted in their business and prevented from competing on substantially equal terms with the said conspirators and with the said association plants in carrying on the business of outdoor advertising.

The said association charged excessive and prohibitive prices, to-wit: the sum of Twenty-five Hundred ($2,500.00) Dollars, per year, for furnishing the statistical data hereinabove referred to, to independent plants, independent agencies, independent solicitors, and non-bureau agencies, and charged a lesser and reasonable price for said service to their member plants, to association licensed solicitors.

Said association licensed exclusive solicitors, sometimes called National Solicitors, to solicit outdoor advertising contracts to be executed on association plants. Said solicitors were prevented by action of the association and of the conspirators, from soliciting contracts to be executed in any part [20] whatsoever on independent plants, and on the other hand, the association plants refused to post any outdoor advertising display unless the contract therefor came through a licensed solicitor of the association.

In the case of each action of the conspirators and/or the association, heretofore set out in Para-

graph X, the said action was taken in furtherance of the plan, scheme and conspiracy to monopolize the outdoor advertising business, as heretofore referred to, and was for the purpose of coercing and intimidating, and it did, in fact, coerce and intimidate advertisers, lithographers and competitors of defendant, and was for the further purpose of hampering and preventing independent plant owners, including the plaintiff and other competitors of the association plants and of the conspirators, from entering into and executing outdoor advertising contracts as aforesaid; that thereby the said independents were obstructed and hindered in their business and competition with the association members and said conspirators, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.

In or about the year 1917 the solicitors holding licenses or franchises from the association formed an association or company known as "Poster Advertising Company, Inc."

XI.

Prior to about the year 1915 practically all outdoor advertising was sold by the solicitors licensed by and through the association and by the sales departments maintained by the plant owners. From the year 1915, or thereabouts, the practice of placing outdoor advertising contracts through advertising agencies became increasingly general, and

about the year 1918 it had become an important factor in the business. At or about [21] that time, to-wit: the year 1918, the National Outdoor Advertising Buearu was formed.

The National Outdoor Advertising Bureau, Inc., hereinafter referred to as "The Bureau", is a corporation organized and existing under and by virtue of the laws of the State of New York. It is engaged in the business of aiding and assisting its stockholders and others employing its services in soliciting and executing contracts for national outdoor advertising. The stockholders in the Bureau, called "Bureau members", are engaged in conducting advertising agencies. That part of the business of these stockholders and others employing the services of the Bureau which relate to outdoor advertising is under the direction and supervision of the Bureau, which maintains offices in the City of New York; Chicago, Illinois; San Francisco, California; and elsewhere throughout the United States, including the Pacific Coast Area.

Members of the Bureau constitute practically all of the large advertising agencies in the United States, and have offices in all the largest cities and towns throughout the United States, including the Pacific Coast.

The agencies composing the said Bureau became members thereof under and by virtue of a stock option purchase agreement. All of the capital stock of said Bureau was held by George C. Sherman, Frederick J. Ross, and William D. McJunkin, trus-

tees for the Bureau, and for those purchasing options upon the capital stock of the Bureau. In and by said stock option purchase agreement it was provided, understood and agreed that the grantee (the agency), becoming a member, purchased an option upon one or more shares of the capital stock of the Bureau at the price of One Hundred ($100.00) Dollars per share; each share covered by such option was assessable in a sum not exceeding [22] One Hundred ($100.00) Dollars in any calendar year, and it was further provided and agreed:

"During the life of this option the grantee covenants and agrees that the Bureau shall be the grantee's sole agent for the placing of outdoor advertising and shall collect and receive for its services and expenses of every nature, that percentage of commissions which may be paid on account of such advertising as is currently charged to all its other members.

"This option is personal to the grantee, and is not transferable, nor can any rights or privileges under it, or of membership in the Bureau be transferred.

"It is agreed that any breach of any of the terms hereof by the grantee or any act or conduct of the grantee which shall or may be prejudicial to the interest of the Bureau, may cause the suspension or expulsion of the grantee from membership in the bureau, and the forfeiture of all rights and privileges of membership, as well as the forfeiture and cancellation of this option, and the forfeiture of the money paid therefor."

The Bureau kept a list of all association plants, and the statistical information furnished by the association with respect to its member plants, the kind, character and amount of service that could be rendered by any plant, and kept said statistical information, which was in a constant state of flux and change, substantially down to date. This information was [23] furnished without charge by the Bureau to its members. It is impossible to conduct an agency for the securing and posting of outdoor advertising contracts successfully without this information, and the Bureau being the only method by which it could be obtained, except through paying the prohibitive price exacted by the association to non-bureau members. The practical effect of the arrangement was that agencies desiring to handle outdoor advertising were compelled to, and did, become members of the Bureau, thus making the Bureau their exclusive agent (under the stock option above quoted) for the placing of outdoor advertising contracts secured by member agencies.

XII.

Prior to 1925 there were two principal groups of companies in the United States, exclusive of the Foster & Kleiser Co., engaged in soliciting national outdoor advertising and operating large poster and paint plants. These were: (1) the so-called Thomas Cusack group, and (2) the so-called Fulton group.

The principal company in the Cusack group was the Thomas Cusack Company, incorporated in 1903 under the laws of the State of New Jersey. The

Cusack Company gradually extended its ownership of both paint and poster plants until during the period from 1918 to 1920 it and its subsidiary companies conducted soliciting offices and operated poster plants in many of the principal cities of the United States, including New York, Chicago, St. Louis, Kansas City, Omaha, Denver, New Orleans, Indianapolis, St. Joseph, Philadelphia, Buffalo, Rochester, Cleveland, Dayton, Baltimore, Washington, Hartford, Memphis, Pittsburgh, Akron, Davenport, Duluth, Nashville, Youngstown, and Jacksonville, Florida. It also operated poster plants and paint plants in about one hundred smaller cities throughout the United States. [24]

In addition to soliciting and display facilities owned and operated by the Cusack Company, or subsidiaries thereof, there was in existence a contractual arrangement between the said Cusack Company and the Bureau whereby the Cusack Company executed all of the contracts for National Outdoor Advertising Bureau obtained by members of the Bureau.

This contract contained the same, or substantially the same, provisions as the contract hereafter referred to between said Bureau and General Outdoor Advertising Company. As a result of the ownership and control of poster plants and paint plants, together with the contractual arrangement with the Bureau, between the years 1918 and down to the formation of the General Outdoor Advertising Company in 1925 (hereafter described) the Cusack

group of companies was and constituted the largest outdoor advertising business in the world.

As a part of said conspiracy and combination to monopolize, attempt to monopolize, and to monopolize through an arrangement between the said Cusack Company and defendant, Foster & Kleiser Co., and as plaintiff is informed and believes, and upon and according to such information and belief alleges, more particularly between Walter F. Foster, in his own behalf, and acting on behalf of the said Foster & Kleiser Co., and the said Cusack Company, all of the national outdoor advertising business secured through the Bureau and Bureau members, and executed by the Cusack Company under the contract aforesaid were, insofar as said contracts were to be executed upon the plants in the Pacific Coast Area, sublet to Foster & Kleiser Co., and none of said contracts, nor any part thereof, were executed on any of the plants of the independent companies, whereby the said independent companies in the Pacific Coast Area were excluded from participation in said business; competition in the business was [25] restrained, hampered and hindered, and interstate trade and commerce in posters, lithographs, paint designs and contracts for the execution and display of outdoor advertising in interstate commerce were, and each of them was, unreasonably hampered, restrained and restricted.

XIII.

The Fulton group, hereinabove referred to, consisted of the Poster Advertising Company, Inc.,

which company was exclusively a soliciting or sales company, with which were affiliated approximately twenty (20) plants, owners operating plants in the states of New York, Virginia, Connecticut, Illinois, Pennsylvania and Georgia.

Toward the end of 1924, in furtherance of said plan and conspiracy, and for the purpose of monopolizing and attempting to monopolize the business of outdoor advertising in interstate commerce, it was proposed, and negotiations were started for the purpose of merging the said Fulton group, the said Cusack group, and defendant, Foster & Kleiser Co. To that end and for that purpose General Outdoor Advertising Company, Inc., (hereafter called the "General Company") was incorporated under the laws of the State of New Jersey, in which there was merged the Cusack Companies and the Fulton Companies, including Poster Advertising Company, Inc. The ultimate arrangement did not include the merging of defendant, Foster & Kleiser Co. In lieu and in the place and stead of said defendant, Fost. & Kleiser Co., merging in said General Outdoor Advertising Company, Inc., the following arrangement was made and carried into effect, to-wit: Foster & Kleiser Investment Company, a corporation, organized under the laws of the State of California, the capital stock of which, except for one director's qualifying share, was and is wholly owned by said Foster and said Kleiser, purchased [26] certificates representing fifty thousand (50,000) shares of the common capital stock of the General Company for the sum of

One Million ($1,000,000.00) Dollars. Said George W. Kleiser was elected a director of said General Company. A community of interest between the General Company and Foster and Kleiser Company was thereby established, whereby the said Foster and Kleiser Company conducted its business operations on the Pacific Coast and the territory west of the Rocky Mountains, and the General Company conducted its business operations east of the Rocky Mountains without entering each other's territory or competing each with the other.

In furtherance of and as a part of the said plan, scheme, and conspiracy to monopolize the business of outdoor advertising in interstate commerce, and in furtherance of the monopoly thereof, the said contract between the Bureau and the Cusack Company heretofore referred to was cancelled and a new contract bearing date the 24th of August, 1925, was made and entered into betwen said Bureau and General Outdoor Advertising Company, under which contract the Bureau was constituted agent of the General Company to solicit contracts for national outdoor advertising to be executed upon the plants owned or operated by the General Company, and at the option of the Bureau to be executed upon plants not owned or operated by the General Company. Said contract further provided that all advertising contracts procured or obtained by the Bureau to be performed by the General Company should forthwith be assigned by the Bureau to the General Company. In the practical operation of this contract all of the contracts for outdoor advertising obtained by

the agencies which were members of the Bureau were assigned to the General Company, and under the plan, scheme and conspiracy heretofore referred to and the community of interests and close working relationship between Foster & Kleiser Co. and the said General Company, all of said contracts which [27] were to be executed upon the Pacific Coast or in plants in the Pacific Coast area were executed upon the plants of Foster & Kleiser Co., and none of said contracts were executed upon independent plants, and the said independent plants were excluded from competition for or participation in all of the national outdoor advertising of the United States.

From and after the completion of the formation of the General Company, said General Company had approximately one thousand (1,000) franchises or memberships in the paint association and poster association, and was the largest single holder of franchises or memberships therein. Foster and Kleiser Company had approximately six hundred (600) memberships therein and was the second largest holder of franchises or memberships therein, and after the consolidation of the two associations into Outdoor Advertising Association, Inc., in 1927, the said General Company and Foster and Kleiser Company became and were the two largest holders of memberships therein. Of the twenty-seven (27) directors of said Outdoor Advertising Association, Inc., six (6) were officers or employees of the General Company, and said Kleiser was a director and for many years president of said association. The said conspirators thereby controlled and dominated

said association and the operation and functioning thereof.

XIV.

By the domination and control of the association, the conspirators thereby controlled the method and manner in which said associations, and their successor association, collected, compiled, listed and furnished to agencies information respecting the kind and character of service offered by various plant owners, and excluded from said service all information respecting independent plants;

Through said associations and association and also through [28] the Poster Advertising Company, said conspirators controlled the solicitors licensed by the association and thereby prevented such solicitors from placing business on independent plants. By refusing to post advertising unless received through a solicitor (except such as came from or through the Bureau), advertisers were thereby compelled to place their advertising on association plants or not advertise at all. By charging an excessive and prohibitive price for said statistical service to non-bureau members, and by paying a commission of sixteen and two-thirds (16⅔%) per cent. to Bureau members and a commission of ten (10%) per cent. to non-bureau members, said conspirators compelled advertising agencies to be and become members of the Bureau. Through said stock option purchase agreement, said Bureau members were compelled to and did make said Bureau the sole agent for the placing of said business,

through said agreement with the Cusack Company, and later with the General Company, said Bureau placed all of said business with said companies and through the community of interests established as aforesaid between the General Company and Foster & Kleiser Co., all of said business in the Pacific Coast Area was placed for execution upon the plants of Foster & Kleiser Co. to the exclusion of all independent plants, including the plant of plaintiff, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was thereby monopolized, restricted, curtailed and unreasonably restrained.

Plaintiff is informed and believes, and upon and according to such information and belief, alleges that as a result of the things and matters in this complaint set forth, said Foster & Kleiser Co. for several years last past has controlled, and does now control, over ninety (90%) per cent of the outdoor advertising business in said Pacific Coast area. [29]

XV.

That the defendants, in furtherance and as a part of said plan, scheme and conspiracy mentioned heretofore and particularly in paragraph VII, VIII, XII and XIII hereof, from the year 1920 and during all the times herein mentioned, the precise dates of which are unknown to plaintiff company, but known to defendants, have monopolized and attempted to monopolize, and now are monopolizing the said trade and interstate commerce in outdoor advertising in the manner and by the means herein

alleged, and have been engaged in a conspiracy and combination to place unlawful restraints upon the trade and commerce in posters and lithographs between the several states of the United States, in violation of the provisions of the Act of Congress approved July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act, and in furtherance of said conspiracy and combination, did place unlawful restraints upon the trade and commerce in posters and lithographs and painted display advertising between the several states of the United States, by the commission of various and sundry acts, specific instances of which are as follows, to-wit:

That defendants formulated, adopted and practiced the policy of interfering with all competitors of any of the defendants, and particularly the defendant Foster & Kleiser Co., for the purpose of preventing said competitors from carrying on their lawful business and the aforesaid interstate trade and commerce in outdoor advertising in competition with the defendants, and particularly in competition with the defendant Foster & Kleiser Co. That the defendants offered to pay, and in fact did pay for outdoor advertising sites, amounts greatly in excess of their true worth and value, and did thereby prevent plaintiff and other [30] competitors in and among the Pacific Coast States from procuring said advertising sites at a reasonable price. That defendants offered to purchase and

lease outdoor advertising sites for amounts greatly in excess of their true worth and value. That said offers were made under fictitious names, without any intent on the part of the defendants to consummate the same and with intent, solely, of preventing plaintiff company and other competitors from procuring said advertising sites at a reasonable price. That defendants attempted to cause and did cause the cancellation of leases held by plaintiff company and other competitors by causing the lessors thereof to demand possession of said sites for other than advertising purposes. That defendants did make fictitious offers to lessors of advertising sites to plaintiff company and other competitors of the defendants for the leasing of such sites for purposes other than advertising, with no intent to actually lease said sites, but only for the purpose of preventing plaintiff company and other competitors of defendants from using said sites for advertising purposes. That defendants attempted to lease and actually did lease more outdoor advertising sites than were reasonably required for the proper conduct of the outdoor advertising business of defendants, and particularly of the defendant Foster & Kleiser Co., and without any intent to use said sites for the purpose of outdoor advertising, but merely for the purpose of preventing and excluding the use thereof for outdoor advertising by the plaintiff company or other competitors of the defendants.

That defendants attempted to lease and actually did lease outdoor advertising sites without using the same or intending to use the same for any purpose

reasonably necessary or incidental to the proper conduct of the outdoor advertising business, but solely for the purpose of preventing and excluding the plaintiff [31] company and other competitors from the use thereof for outdoor advertising purposes, and from carrying on their respective businesses in competition with defendants. That defendants attempted to lease and actually did lease outdoor advertising sites from lessors on the understanding that the same would not be used for outdoor advertising purposes solely with intent to prevent and exclude plaintiff company or any other competitors leasing said sites for outdoor advertising purposes. That defendants employed a system of espionage and continuously solicited, obtained, procured and reported detailed information regarding outdoor advertising sites leased or contemplated by the plaintiff company and other competitors to be leased for outdoor advertising purposes in order that defendants could defeat the efforts of plaintiff company and other competitors in procuring said leases and in devoting the same advantageously to the business of outdoor advertising, and did actually utilize and make use of said information for the sole purpose of preventing and excluding the plaintiff company and other competitors of the defendants from transacting their respective businesses in competition with defendants. That defendants employed a contact system whereby defendants continuously contacted lessors of property under lease to plaintiff company in an endeavor to have lessors breach plaintiff company's leases and thereby elimi-

nate plaintiff company as competitor of the defendants.

That defendants did physically obstruct, conceal, cover, obliterate, destroy and otherwise impair the visibility and display advantages of outdoor advertising structures owned, operated and/or controlled by the plaintiff company and other competitors of the defendants; that the defendants employed agents and lobbyists for the purpose of obtaining information and cooperation from city and county officials of cities and counties [32] situated in and among the several states of the Pacific Coast Area regarding outdoor advertising sites owned or leased, or intended to be owned or leased by the plaintiff company and other competitors of the defendants, and utilizing and making use of the said information or cooperation solely for the purpose of preventing and excluding the plaintiff company and other competitors from procuring or retaining advantageous advertising sites leased or contemplated to be leased for outdoor advertising purposes and did employ such agents and lobbyists for the purpose of procuring for the defendants, particularly for the defendant Foster & Kleiser Co., advantages and concessions over the plaintiff company and other competitors in the leasing and maintaining of outdoor advertising sites.

That, in each and every instance heretofore referred to in this paragraph XV, where, solely with intent to monopolize the outdoor advertising business by preventing the plaintiff company from soliciting, securing and executing outdoor advertising

contracts which were entered into or would have been entered into for the primary purpose of moving advertising posters, lithographs, designs, stencils and/or other advertising materials in interstate commerce to and including the posting of the posters or lithographs and/or painting from the designs, stencils and other advertising materials upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels owned or within the control of the plaintiff company, the defendants interfered with the plaintiff company's business by paying exorbitant sums for lease or purchase of outdoor advertising sites or structures, caused the cancellation of plaintiff company's leases of outdoor advertising sites or structures, prevented plaintiff company from leasing outdoor advertising sites or structures by making fictitious [33] offers therefor for other than advertising purposes, leased more outdoor advertising sites or structures than necessary for the proper conduct of its business, and/or physically obstructed, concealed, covered, obliterated, destroyed and otherwise impaired the visibility and display advantages of outdoor advertising structures owned, operated and controlled by the plaintiff company and other competitors of the said defendants, the instant, direct and continued effect constituted and was a substantial restraint upon and interference with the plaintiff company's outdoor advertising business in its interstate aspects by rendering the legitimate performance of existing contracts and the continuation thereof by the pro-

curation of new contracts partially or wholly impossible and tended immediately to further the aforementioned plan, scheme and conspiracy to attempt to monopolize and to monopolize the outdoor advertising business throughout the Pacific Coast Area.

XVI.

Plaintiff company further alleges that during the month of January, 1932, C. E. Stevens, President of the plaintiff company, established a business office at San Francisco, California, for the purpose of expanding plaintiff company's outdoor advertising business into the city and county of San Francisco, in order that it would be able to serve its customers with an outdoor advertising display service in the State of California in conjunction with the service it already offered; that as soon as C. E. Stevens established himself and became engaged in attempting to lease outdoor advertising sites, defendants, particularly Foster & Kleiser Co., learned of plaintiff company's plans, and in furtherance and as part of said plan, scheme and conspiracy mentioned in paragraphs VII, VIII, XII and XIII hereof, immediately set in motion a scheme and concerted effort to restrain and [34] prevent plaintiff company from obtaining any advantageous outdoor advertising locations and thereby prevented and restrained the plaintiff from establishing an outdoor advertising plant in the city and county of San Francisco, California; that defendants, particularly Foster & Kleiser Co., on learning of plaintiff com-

pany's plans to establish an outdoor advertising plant at San Francisco, immediately instructed their employees to lease every available outdoor advertising site in and about the city of San Francisco in order that it would be impossible for the plaintiff company to obtain any locations and thereby prevent plaintiff company from establishing an advertising plant in competition with defendant Foster & Kleiser Co., solely with intent to monopolize the outdoor advertising business by preventing the plaintiff company from soliciting, securing and executing outdoor advertising contracts which were entered into or would have been entered into for the primary purpose of moving advertising posters, lithographs, designs, stencils and/or other advertising materials in interstate commerce to and including the posting of the posters or lithographs and/or the painting from the designs, stencils and other advertising materials upon billboards or paint panels owned by or within the control of the plaintiff company; that plaintiff company was put to great expense and loss of time in attempting to establish an outdoor advertising business, as the same has been heretofore defined and explained, in San Francisco and has lost the profits and will continue to lose profits from many advertising accounts by reason of said unlawful acts; that due to the unfair and unlawful practices of defendants, plaintiff company has been restrained and prevented from establishing a business in San Francisco, all to the great injury and damage to plain-

tiff company herein; that plaintiff company at all times intended and was prepared to establish an outdoor advertising business in the [35] City of San Francisco, California, and would have and could have established said outdoor advertising business and engaged in interstate commerce therein, as aforesaid, but for the unlawful restraints and restrictions placed upon plaintiff company by defendants.

XVII.

That the aforesaid acts, on the part of the defendant company and the other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its trade and competition with defendant in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned, to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been

damaged thereby, from said year 1924 to the time of filing the complaint, and furthermore, as set forth more particularly in paragraph XV hereof, the plaintiff company has suffered great loss of profits and moneys invested and damage by reason of its inability to engage in said trade and commerce in the City of San Francisco and the State of California, all in the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00).

Wherefore, plaintiff, C. E. Stevens Company, demands judg- [36] ment against defendants for the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00), and treble damages, together with reasonable counsel fees, besides the costs and disbursements of this action.

SECOND COUNT

I.

That plaintiff C. E. Stevens Tacoma Company is now, and ever since about June 1, 1928, and at all times herein mentioned, has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington having its principal place of business located at Tacoma, Pierce County, State of Washington. That ever since June 1, 1928, plaintiff has been engaged in the business of outdoor advertising in the said State of Washington and other states of the United States, and has been at all times engaged in

interstate commerce between the various states of the United States, as will more fully appear hereinafter.

II.

For the sake of brevity of pleading the plaintiff company refers and by this reference repeats all of the allegations contained in Paragraphs II to XV, inclusive, of the First Count, hereof, and re-affirms, realleges and adopts each and every such allegation as an allegation of the cause of action of this plaintiff company, C. E. Stevens Tacoma Company.

III.

That the aforesaid acts, on the part of the defendant company and other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the [37] plaintiff company was unreasonably restrained in its said trade and competition with defendants in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned to and including the date of the commencement of

this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of the said trade and commerce have diminished and the plaintiff company has suffered loss and been damaged thereby, from said June 1, 1928, to the time of filing the complaint herein, in the sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, the plaintiff, C. E. Stevens Tacoma Company, demands judgment against the defendant and prays for treble damages herein, together with reasonable counsel fees, besides the costs and disbursements of this action.

THIRD COUNT

I.

That C. E. Stevens Company of Oregon is now, and ever since about June 1, 1928, and at all times herein mentioned has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business located at Portland, Multnomah County, State of Oregon; that ever since June 1, 1928, plaintiff company has been engaged in outdoor advertising in said State of Oregon and other states of the United States, and has been at all times engaged in interstate commerce between the various states of the United States, as will more fully appear hereinafter.

II.

For the sake of brevity of pleading the plaintiff company refers and by this reference [38] repeats

all the allegations contained in Paragraphs II to XV, inclusive, of the First Count hereof, and reaffirms, realleges and adopts each and every such allegation as an allegation of the cause of action of this plantiff company, C. E. Stevens Company of Oregon.

III.

That the aforesaid acts, on the part of the defendant company and other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its said trade and competition with defendants in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of the said trade and commerce have diminished and the plaintiff company has suffered loss and been damaged thereby, from said June 1, 1928, to the time of the filing of the complaint herein, in the sum of One Hundred Thousand Dollars ($100,000).

Wherefore, the plaintiff, C. E. Stevens Company of Oregon, demands judgment against the defendants and prays for treble damages herein, together with reasonable counsel fees, besides the costs and disbursements of this action.

ROY E. JACKSON
WRIGHT, JONES & BRONSON
Attorneys for Plaintiffs. [39]

State of Washington,
County of King—ss.

C. E. Stevens, being first duly sworn on oath on behalf of the plaintiff corporations in the above-entitled action, says: That at the time of the filing of the original complaint herein he was the president of each of said corporations; that at present he is president of the C. E. Stevens Company of Oregon; that he has read the foregoing Second Amended Complaint, knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes them to be true.

C. E. STEVENS

Subscribed and sworn to before me this 28th day of March, 1938.

[Seal] A. P. BOWES,
Notary Public in and for the State of Washington, residing at Seattle.

Copy received this 30th day of Mar., 1938.
KERR, McCORD & CAREY
By C. A.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division Mar. 30, 1938. Edgar M. Lakin, Clerk, By Elmo Bell, Deputy. [40]

[Title of District Court and Cause.]

DEMURRER TO SECOND AMENDED COMPLAINT

Comes now each of the defendants Foster and Kleiser Company, a corporation, Gerald O'Neil and Restop Realty Company, a corporation, separately, the said Foster and Kleiser Company and Gerald O'Neil by their attorneys, Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, and the said Restop Realty Company by its attorneys, Kerr, McCord & Carey and Stephen V. Carey, and severally, each on its or his behalf, and not one for the other nor jointly, demurs to the second amended complaint of the plaintiffs and to the First Count thereof, purporting to set forth a cause of action in favor of C. E. Stevens Company, as follows, to-wit:

I.

That the court has no jurisdiction of the persons of the defendants, or any of them, or of the subject matter of the action in that: [41]

(a) No cause of action is stated therein by the plaintiff C. E. Stevens Company against the defendants, or either or any of them, within the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies;"

(b) That said First Count does not set forth a substantial claim presenting a cause within the jurisdiction of this court as a Federal Court; and

(c) It appears upon the face of said First Count that a complete diversity of citizenship does not exist between the plaintiffs and the defendants and the said asserted First Count does not state facts to show any other ground upon which this court has jurisdiction of the subject matter of the action.

II.

That several causes of action are improperly united in that it appears upon the face of said second amended complaint that C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, are joined as plaintiffs, although the alleged right or rights of each of said plaintiffs are not joint with the alleged right or rights of both or either of the other plaintiffs but that such alleged right or rights of each plaintiff, if any, are separate, distinct and unconnected.

III.

That the said First Count does not state facts sufficient to constitute a cause of action against the defendants, or any or either of them.

IV.

That it appears upon the face of the said First Count that the cause of action attempted to be stated therein has not been commenced within the time limited by law and that said cause of action, if any such cause of action has heretofore existed, is now barred under and by reason of the provisions of Section 165 of [42] Remington's Revised Statutes of Washington or by subdivision (2) of Section 159 of Remington's Revised Statutes of Washington.

DEMURRER TO SECOND COUNT

To the Second Count of said second amended complaint, purporting to set forth a cause of action in favor of C. E. Stevens Tacoma Company, the said defendants severally, each on its or his behalf, and not one for the other nor jointly, demurs upon the same grounds heretofore stated in respect of the said First Count.

DEMURRER TO THIRD COUNT

To the Third Count of said second amended complaint, purporting to set forth a cause of action in favor of C. E. Stevens Company of Oregon, the said defendants severally, each on its or his behalf,

and not one for the other nor jointly, demurs upon the same grounds heretofore stated in respect of the said First Count.

We hereby certify that the foregoing demurrer to the second amended complaint is not filed for purposes of delay and that same in our opinion is well taken in point of law.

Dated July 8, 1938.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK,
HERBERT W. CLARK,
Attorneys for Foster and Kleiser
Company and Gerald O'Neil.

KERR, McCORD & CAREY,
STEPHEN V. CAREY,
Attorneys for Restop Realty Company.

Service by receipt of copies hereof admitted this 11th day of July, 1938.

ROY E. JACKSON,
WRIGHT, JONES & BONSON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1938, Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [43]

COURT'S RULING SUSTAINING DEFENDANT'S DEMURRER TO SECOND AMENDED COMPLAINT.

United States District Court
Western District of Washington
Seattle, Washington

Chambers of John C. Bowen, District Judge

April 26, 1939.

Jones & Bronson and Roy E. Jackson,
610 Colman Building,
Seattle, Washington.

Attorneys for Plaintiffs.

Kerr, McCord & Carey and
Morrison, Hohfeld, Foerster, Shuman & Clark,
1309 Hoge Building,
Seattle, Washington,

Attorneys for Defendants.

Re: Stevens Co. v. Foster & Kleiser Co., No. 20755.

Dear Sirs:

I am of the opinion that the Second Amended Complaint stripped of pleader argument and conclusion does not sufficiently state facts or factual basis for the alleged direct interstate interference by any of the defendants with plaintiffs' outdoor advertising business, and that no sufficient cause of action is stated under the Sherman Anti-Trust Act. Foster & Kleiser Co. v. Special Site Sign Co., 85 F.

(2d) 742 (cer. den. 299 U. S. 613); Ebeling v. Foster & Kleiser Co., 12 F. Supp. 489; and Shurtz v. Foster & Kleiser, et al., D. C., N. Dist. of Cal., No. Law 19795-S, Decision by St. Sure, D. J., filed Feb. 2, 1939.

This case having on both sides and for a long time had the active attention of eminent counsel who have been advised of the progress and outcome of the similar cases herein and in the briefs cited, and plaintiffs' complaint having been amended twice already, the demurrer to the second amended complaint will be as to all defendants sustained without leave to amend.

An order carrying the foregoing into effect may be settled upon notice or stipulation.

Yours respectfully,

JOHN C. BOWEN,

U. S. Dist. Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 26, 1939, Elmer Dover, Clerk. By Elmo Bell, Deputy. [44]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755.

C. E. STEVENS COMPANY, a Corporation, C. E. STEVENS TACOMA COMPANY, a Corporation, and C. E. STEVENS COMPANY OF OREGON, a Corporation,

Plaintiffs,

v.

FOSTER & KLEISER CO., a Corporation, GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, Jr., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO., a Corporation, GERALD O'NEIL, LYLE ABRAHAMSON, PAUL DUEBER, WALTER STEVENS and GEORGE SMITH,

Defendants.

JUDGMENT.

This cause heretofore came on regularly for hearing on the separate demurrers of the defendants Foster and Kleiser Company, a corporation, Gerald O'Neil, Restop Realty Co., a corporation, and George W. Kleiser (the defendant George W. Kleiser having by stipulation of counsel and approval of the Court demurred separately by adopting the grounds of demurrer stated in the separate demurrers on file herein of the other defendants) to the second amended complaint of the plaintiffs, C.

E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, the several parties plaintiff and defendant appearing by their respective attorneys of record, and was submitted to the Court on written briefs and arguments; and the Court having considered the same and having, on April 26, 1939, filed its opinion holding that said second amended complaint as this day amended by interlineation is insufficient to state any cause of action in favor of either or any of said plaintiffs against [45] all or any of the defendants, and that said demurrers should be sustained without leave to amend; and it appearing to the Court that none of the parties named in the title of this cause as defendants other than said Foster and Kleiser Company, a corporation, Gerald O'Neil, Restop Realty Co., a corporation, and George W. Kleiser have been served with process, nor have they, or either of them, appeared herein, Now, Therefore,

It Is Ordered, Adjudged and Decreed that said demurrers, and each of them, be and they are each hereby sustained without leave to amend; that said plaintiffs, and each of them, take nothing by the above entitled action; that said action be and it is hereby dismissed; and that said defendants, and each of them, have and recover their costs of suit herein to be taxed by the clerk as provided by Rule 54.

Let this judgment be entered.

Done in Open Court this 8th day of June, 1939.

JOHN C. BOWEN,
United States District Judge.

Presented by:
STEPHEN V. CAREY,
One of Defendants' Attorneys.

Approved as to form:
H. R. JONES,
One of Attorneys for Plaintiffs.

In open Court at the time of the entry of the foregoing judgment the plaintiffs objected thereto, claiming their second amended complaint as this day amended by interlineation to be sufficient to state a cause of action, and said objection and exception is now noted and allowed.

Done in Open Court this 8th day of June, 1939.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 8, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [46]

[Title of District Court and Cause.]

NOTICE OF APEAL TO CIRCUIT COURT OF APPEALS.

Notice Is Hereby Given that C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, plaintiffs above-named,

hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on June 8, 1939.

ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

Address:
610 Colman Building,
Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [47]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men by These Presents:

That the Undersigned, C. E. Stevens Company, a Corporation, et al. in the above entitled action, as Principals, and Occidental Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto the above entitled Foster & Kleiser Co., a Corporation, et al, in the penal sum of Two Hundred Fifty ($250.00)

Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally firmly by these presents.

Dated and sealed this 16th day of June, 1939.

Whereas, on the 8th day of June, 1939, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named obligees and against the above named principals;

And Whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the U. S. Circuit Court of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such, that if the said appellants will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty ($250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

C. E. STEVENS COMPANY, et al.

By (Signed) JONES & BRONSON,

Attorneys for C. E. Stevens Company et al.

Attest:

OCCIDENTAL INDEMNITY COMPANY

By J. E. CHARBONNEL,

Attorney in Fact.

[Seal]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL.

Come now C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, plaintiffs above-named, and file this statement of points on which they intend to rely on their appeal from a certain final judgment of this Court, in the above-entitled cause, made and entered on June 8, 1939, to-wit:

1. That as a matter of law the facts stated by the Second Amended Complaint in the above-entitled cause sufficiently set forth a cause of action under the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

2. That as a matter of law the Second Amended Complaint in the above-entitled cause sufficiently states facts or factual basis for the alleged direct interstate interference by the defendants with plaintiffs' out- [49] door advertising business.

3. That, within the meaning of Rule 15 (a) of the Federal Rules of Civil Procedure, justice requires that leave be given to the plaintiffs in the above-entitled cause to amend their Second Amended Complaint, even though it be held that the said complaint is insufficient to state a cause of action under the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [50]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal in the above-entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Second Amended Complaint.
2. Demurrer to Second Amended Complaint.
3. Letter: John C. Bowen, U. S. District Judge, to counsel, embodying Memorandum Opinion, dated April 26, 1939.
4. Judgment, dated June 8, 1939.

Respectfully,
ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [51]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 51 both inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Appeal fee (Sec. 5 of Act)	$ 5.00
Clerk's fees (Act Feb. 11, 1925) for comparing record—166 folios at .05c	8.30
Certificate of Clerk to Transcript of Record	.50
Total	$13.80

I hereby certify that the above cost for preparing and certifying record, amounting to $13.80 has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 19th day of June, 1939.

[Seal] ELMER DOVER,
Clerk, United States District Court for the Western District of Washington.
By ELMO BELL, Deputy.

[Endorsed]: No. 9215. United States Circuit Court of Appeals for the Ninth Circuit. C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, Appellants, vs. Foster & Kleiser Co., a corporation, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., Albert Mortenson, Gilman Haynes, Restop Realty Co., a corporation, Gerald O'Neil, Lyle Albrahamson, Paul Dueber, Walter Stevens and George Smith, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 23, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9215.

C. E. STEVENS COMPANY, a Corporation, et al,
Appellants,

v.

FOSTER & KLEISER CO., a Corporation, et al,
Appellees.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk:

As and for the record on appeal herein, you are requested to print the entire transcript of record in the above-entitled appeal as certified to you by the Clerk of the District Court of the United States, for the Western District of Washington, Northern Division.

Respectfully,
ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
R. E. BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

Copy Received this 29th day of June, 1939.
KERR, McCORD & CAREY.
By C. A.

[Endorsed]: Filed June 29, 1939, Paul P. O'Brien, Clerk.

No. 9215

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. E. STEVENS COMPANY, a corporation, C. E. STEVENS TACOMA COMPANY, a corporation, and C. E. STEVENS COMPANY OF OREGON, a corporation,

Appellants,

vs.

FOSTER & KLEISER CO., a corporation, GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, JR., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO., a corporation, GERALD O'NEIL, LYLE ALBRAHAMSON, PAUL DUEBER, WALTER STEVENS AND GEORGE SMITH,

Appellees.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO.

[Title of Circuit Court of Appeals and Cause.]

MOTION OF APPELLEES FOR CORRECTION OF RECORD ON SUGGESTION OF OMISSION OF MATTER MATERIAL TO APPELLEES.

Come now appellees Foster and Kleiser Company, a corporation, George W. Kleiser, Restop Realty Company, a corporation, and Gerald O'Neil, and suggest the omission in the record of the above entitled action of matter material to appellees, as follows:

(1) The transcript of record now on file in this court omits matter material to these appellees, in that appellants' motion filed in the District Court of the United States for the Western District of Washington, Northern Division, on June 8, 1939 praying for leave to amend their second amended complaint and the order of said court dated June 8, 1939 allowing the requested amendment, were omitted therefrom.

(2) The aforesaid omitted matter is material to these appellees for the reasons that:

(a) Appellants in Point 3 of their statement of points on appeal (Tr. p. 62) and at pages 69-71, inclusive, of their brief on appeal claim that said court below erred in denying them further leave to amend their second amended complaint;

(b) The transcript of record on appeal now before this court contains appellants' second amended complaint (Tr. pp. 2-50, inclusive) as amended by said order of said court below dated June 8, 1939;

(c) Said amendment appears in the transcript now before this court at pages 19 and 20 of said transcript;

(d) It nowhere appears in said transcript that said amendment to appellants' second amended complaint was allowed pursuant to appellants' said motion and said order of said court below dated June 8, 1939, and as the record now stands it would appear to this court that appellants were denied leave to amend their second amended complaint, whereas the fact is, as fully appears in said omitted matter, that said appellants moved said court below for further leave to amend their second amended complaint, and said motion was granted by said court below by its said order dated June 8, 1939;

(e) Appellants are able to present to this court their second amended complaint as amended pursuant to said order of the court below dated June 8, 1939, and nevertheless claim that the record now before this court shows that they were not given said opportunity to amend their second amended complaint by said court below.

(3) Said omitted matter has been omitted from said record on appeal by error and by accident, in that:

(a) The designation of contents of record on appeal which was filed in said court below on June 16, 1939 was served upon the office of Kerr, McCord & Carey and Stephen V. Carey, Esqs., attorneys for appellee Restop Realty Company, in Seattle, Washington, on June 16, 1939, while said Stephen V. Carey, Esq., was absent from his office and in Wenatchee, Washington, on another case from which he did not return until June 22, 1939; in his absence no one else in his office was sufficiently acquainted with said case to note the omission of said material matter; since said Stephen V. Carey, Esq., upon his return to said office, assumed that the matter was in the care of the attorneys for the principal appellees in San Francisco, California, he did not examine said designation of contents of record on appeal with a view to determining whether material matter had been omitted therefrom until the time had expired, pursuant to Rule 75(a) of Rules of Civil Procedure for the District Courts of the United States, for appellees to serve and file a designation of additional portions of the record;

(b) Herbert W. Clark, Esq., one of the attorneys for these appellees who was and is in charge of the above entitled action, was absent

from his office and from California throughout the month of June, 1939, on other business; J. Hart Clinton, Esq., who is associated with said Herbert W. Clark, Esq., and with Morrison, Hohfeld, Foerster, Shuman & Clark, was in charge of the above entitled action in the absence of said Herbert W. Clark, Esq.; a copy of said designation of contents of record on appeal was not received by the office of said Herbert W. Clark, Esq., or by said J. Hart Clinton, Esq., until June 24, 1939, at which time said J. Hart Clinton, Esq., was also absent from said office; and said designation of contents of record on appeal, due to an oversight on the part of the docket clerk of said office, was not brought to the attention of said J. Hart Clinton, Esq., until after the expiration of the time permitted by said Rule 75 (a) for the service and filing of a designation of additional portions of the record.

(4) Said omitted portions of said transcript of record have been prepared and certified by the clerk of the District Court of the United States for the Western District of Washington, Northern Division; said certified copy of said omitted portions are herewith respectfully tendered; and a printed copy of said omitted portions is set forth as Appendix A to the annexed brief of appellees. There is also annexed to this motion the affidavit of J. Hart Clinton, Esq., in support thereof.

Dated, San Francisco, California, August 25, 1939.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK,
HERBERT W. CLARK,
KERR, McCORD & CAREY,
STEPHEN V. CAREY,

Attorneys for Appellees, Foster and Kleiser Company (a corporation), George W. Kleiser, Restop Realty Company and Gerald O'Neil.

J. HART CLINTON,
Of Counsel.

AFFIDAVIT IN SUPPORT OF MOTION FOR CORRECTION OF RECORD.

United States of America,
State of California,
City and County of San Francisco—ss.

J. Hart Clinton, being first duly sworn, deposes and says:

He is, and at all times herein mentioned was, an attorney at law associated with Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, Esq., San Francisco, California, attorneys for Foster and Kleiser Company, a corporation, George W. Kleiser and Gerald O'Neil, appellees in the above appeal, and on behalf of said appellees was

in charge of supervising the preparation of the transcript of record on appeal therein during the absence of Herbert W. Clark, Esq., who was absent from his office, and from the State of California, on other business throughout the entire month of June, 1939.

By accident and error there have been omitted from said transcript of record the motion of appellants filed in the District Court of the United States for the Western District of Washingon, Northern Division, on June 8, 1939 praying for leave to amend their second amended complaint, and the order of said court dated June 8, 1939 allowing the requested amendment, in that:

(1) The designation of contents of record on appeal (Tr. p. 63) does not call for the inclusion of said motion and said order; and appellees failed to serve and file a designation of additional portions of the record within ten (10) days after the service and filing of said designation of contents of record on appeal, as permitted by Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, for the reasons hereinafter stated:

(2) A copy of the designation of contents of record on appeal in the above entitled action was not received by the office of said Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, Esq., until June 24, 1939, although said designation of contents of record on appeal was served upon the office of Kerr,

McCord & Carey and Stephen V. Carey, Esq., in Seattle, Washington, on June 16, 1939, and was filed in said court below on the same day.

(3) At the time said copy of said designation of contents of record on appeal was received by said office of said Herbert W. Clark, Esq., affiant was absent from said office and was in Los Angeles, California, on other business;

(4) Receipt of a copy of said designation of contents of record on appeal was, through error and oversight on the part of the docket clerk of said office, not called to the attention of affiant until the time had expired under said Rule 75(a) for appellees to serve and file a designation of additional portions of the record on appeal;

(5) Affiant is informed by Stephen V. Carey, Esq., one of the attorneys for appellee Restop Realty Company, a corporation, and believes, and upon such information and belief states, that said Stephen V. Carey, Esq., is the only person in his office sufficiently familiar with said action to have noticed the omission of said matter and that said Stephen V. Carey, Esq., was absent from his office and was at Wenatchee, Washington, on other business from on or about June 8, 1939 until on or about June 22, 1939, and that upon his return to said office he assumed that the supervision of said transcript of record on appeal was being taken care of on behalf of all the appellees

either by said Herbert W. Clark, Esq., or this affiant, and that the materiality of the omitted matter was first called to the attention of said Sephen V. Carey, Esq., by affiant long after the time had expired for appellees to file a designation of additional portions of the record pursuant to said Rule 75(a).

Copies of said motion for leave to amend and said order granting the same have been prepared and certified by the clerk of the District Court of the United States for the Western District of Washington, Northern Division. A copy of this affidavit and of the motion and notice of motion to correct the transcript of record will be served by mail upon the attorneys for the appellants in the above entitled appeal.

J. HART CLINTON.

Subscribed and sworn to before me this 25th day of August, 1939.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Motion of Appellees for Correction of Record, etc., and Affidavit in Support of Motion. Filed: August 25, 1939, Paul P. O'Brien, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation,, and C. E. STEVENS COMPANY OF OREGON, a corporation,

Plaintiffs,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Defendants.

MOTION TO AMEND SECOND AMENDED COMPLAINT.

Come now the plaintiffs, C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, joining in this motion for the convenience of the Court and the parties, severally and each on its own behalf and interest, and not one for the other nor jointly, and representing that the defendants herein, on page 21 of Defendants' Opening Brief, have raised the question of the

meaning of the terms "independents" and "independent plant owners," and that the desire of the plaintiff companies is to clearly indicate the meaning of the said terms and similar terms, used in the Second Amended Complaint, to the end that the real issues in the cause may be clearly set forth, respectfully move the Court as follows:

I.

That paragraph VIII of the Second Amended Complaint in the above-entitled cause be amended by the addition *ty* interlineation of the following sentence at the end of line 6, page 15, of the said Second Amended Complaint:

"Wherever used in this complaint, the terms 'independents', 'independent plant owners', 'independent plants' and 'independent companies' include and are intended to embrace the appropriate plaintiff company."

II.

That, in the alternative, in the event it is impracticable to accomplish the said amendment by interlineation, the plaintiffs be given leave to file an amended complaint in the cause, embodying the additional sentence set forth in the preceding paragraph.

JONES & BRONSON
H. B. JONES
ROY E. JACKSON
Attorneys for Plaintiffs
610 Colman Building
Seattle, Washington.

Copy received and it is agreed that the foregoing motion may be considered at the time of the presentation of the order sustaining the demurrer.

Dated May 8, 1939.

STEPHEN V. CAREY
One of Attorneys for Defendants.

The foregoing motion was, before entry of the judgment herein, submitted, considered and granted, this 8th day of June, 1939, to which ruling defendants except, and exception is hereby noted and allowed.

Dated this 8th day of June, 1939.

JOHN C. BOWEN
Judge

United States of America,
Western District of Washington—ss:

CERTIFIED COPY

I, Elmer Dover, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Amend Second Amended Complaint & Order Thereon now remaining among the records of the said Court in my office at Seattle.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-

said Court at Seattle, Washington this 19th day of August, A. D. 1939.

[Seal] ELMER DOVER
Clerk.

By R. B. ALLEN
Deputy Clerk.

[Endorsed]: Filed June 8, 1939. Elmer Dover, Clerk.

[Endorsed]: Filed Aug. 25, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, September 15, 1939.

Before: Wilbur, Haney and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered motion of appellees to add to the transcript of record herein the certified copy of Second Amended Complaint granted.

Further Ordered appeal herein argued by Mr. H. B. Jones, counsel for appellants, and by Mr. Herbert W. Clark, counsel for appellees, and submitted to the court for consideration and decision, with leave to counsel for appellant to file reply brief in 5 days.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, February 19, 1940.

Before: Wilbur, Haney and Healy.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion, concurrence and dissenting opinion, this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

OPINION

Before: Wilbur, Haney and Healy, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from an order of the District Court sustaining appellees' demurrer to appellants' complaint without leave to amend on the ground that no cause of action was alleged. The action was

filed under Section 7 of the Sherman Anti-Trust Act (Act of July 2, 1890, Chap. 647; 26 Stat. 209, as superseded by Act of Oct. 15, 1914, Chap. 323; §4, 38 Stat. 731; 15 U.S.C.A. §15).[1] Both parties are engaged in advertising by means of billboards.

The ruling of the District Court was based on the decision of this court in Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, an action against the same defendant by another competitor. In that case plaintiff sought damages under Section 7 of the Sherman Anti-Trust Act based upon similar activities by the defendant therein as are alleged in the case at bar. In the Special Site Sign Company case, supra, the plaintiff, in an effort to support federal jurisdiction under the Sherman Anti-Trust Act, alleged such interstate activities by the defendant as the shipping by it of designs, posters, lithographs, stencils and paints from one state to another. It also alleged the effect of outdoor advertising in stimulating interstate trade. It al-

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[1]Section 7 of the Sherman Anti-Trust Act, reads as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (July 2, 1890, C.647, §7, 26 Stat. 210, as superseded by Act of Oct. 15, 1914, C.323, §4, 38 Stat. 731, 15 U.S.C.A. §15.)

leged that the defendant attempted to monopolize the outdoor advertising business by acquiring control of numerous outdoor advertising companies by leasing of outdoor advertising sites at rentals in excess of their true worth, by leasing more sites than were intended to be used in the business, by fraudulent activities leading to the cancellation of leases of advertising sites obtained by plaintiffs, and by other unfair business practices designed to squeeze out competitors. (See, Foster & Kleiser Co. v. Special Site Sign Co., 85 F.(2d) 742, 753, supra.) This court held that the complaint did not state a cause of action. It was held that the outdoor advertising business, as a whole, could not be viewed as interstate commerce merely because there was incidentally involved therein the shipment of posters, lithographs, etc., in interstate commerce. It was held that no acts were alleged which directly affected the interstate trade in posters or lithographs and that the acts of the alleged conspirators in inflicting the damage in no way related to the allegations of a conspiracy to restrict interstate commerce in posters and lithographs, etc. It was pointed out in that decision that all the acts alleged as means for carrying out the conspiracy were adopted to the injury or destruction of the plaintiff's business in its intrastate aspects.

In the case at bar, the complaint sets out the general methods of business of companies inoived in the outdoor advertising business. It is alleged that the advertiser generally contracts with a lithog-

rapher for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards. These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. This bureau contracts with bill posting companies called "plant owners" which control sites for bill boards for the execution of the contracts secured by the agencies. Since 1927 bill posting companies have been organized into the Outdoor Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America. These associations grant a "franchise" in each community where a billboard advertising is done. Foster & Kleiser control 600 franchises and the General Outdoor Advertising Company, Inc., an association of bill posters, organized in 1924, controls 1000 franchises. It is alleged that the Outdoor Advertising Association, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. The appellants are "independent" operators and do not belong to the Outdoor Advertising Association of America, Inc. The National Outdoor Advertising Bureau (association of advertising agencies) executes all advertising contracts secured by it through the General Outdoor Advertising Company which company assigns all contracts calling for posting or painting in the Pacific Coast area to Foster & Kleiser Company for execution.

That the activities of these different companies frequently overlap is shown by the allegations of the complaint that contracts for outdoor advertising are made not only by agencies but by bill posting companies. It should be noted that the General Outdoor Advertising Company is not made a party to this action.

The conspiracy alleged is one to monopolize all branches of the outdoor advertising business. As in the Special Site Sign case, it is alleged that in furtherance of the conspiracy the conspirators paid for advertising sites in excess of their worth, caused the cancellation of leases of appellants and did other acts designed to secure for app llees a monopoly of advertising contracts and sites upon which to execute the same. It is also alleged that appellees conspired to place restraints upon interstate trade in posters and lithographs and that the conspirators refused to post lithographs of manufacturers who sold or furnished samples to independent poster plants.

It is claimed, and the basic assumption of the complaint is, that the bill posting business as a whole must be considered as interstate commerce and, consequently, that a monopoly of this business in any of its aspects is a violation of the Sherman Anti-Trust Act. It is also claimed and alleged that appellees conspired to restrain and restrict the shipment of posters and lithographs in interstate commerce.

Insofar as the contention that appellees conspired to restrain the interstate commerce in posters and lithographs is concerned, an analysis of the complaint as a whole clearly shows that the main object of the alleged conspirators was the securing of control of the bill posting business in its intrastate aspects involving the securing of advertising contracts and billboard sites upon which to execute the same.[2] It clearly appears from the complaint that the principal business of the appellee, Foster & Kleiser Company, was the operating of outdoor advertising plants and the securing of advertising contracts, not the sale of posters or lithographs. These materials are sold by lithographers who are located in states other than the Pacific Coast area, principally in Kentucky, Ohio and Illinois. In view of these allegations it can hardly be said that appellees' primary object was to monopolize the trade in posters. It is true, as we have stated, that appellants alleged that the conspiracy in part involved the preventing of appellants from obtaining posters and that in order to effect this result the Outdoor Advertising Association of America, Inc., refused

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[2]Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. Ware and Leland v. Mobile County, 209 U.S. 405; Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436; Pacific Railways Advertising Co. v. Conrad, 168 Cal. 91.

to post lithographs if the lithographer dealt with non-association members. As to the effect of this allegation, we quote from appellees' brief:

> "At this point it may be conceded that the conspiracy just described and the means by which it was to be effected would be unlawful under the Sherman Act. (Ramsay Co. v. Bill Posters Association (1923), 260 U.S. 501, 67 L.Ed. 368, 43 S.Ct. 167.) However, 'in a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom'. Special Site case, supra, 85 F.2d 742, at page 750. Therefore, we must next inquire whether the second amended complaint contains sufficient allegations of fact showing that this alleged conspiracy was made effective to the injury of appellants."

Insofar as this conspiracy is concerned, it is not alleged that it was successful or effective to injure appellants' business. That is, it is not definitely and explicitly alleged that appellants were unable to secure posters necessary for fulfilling their advertising contracts. The appellants, after alleging that the action of the conspirators in refusing to post lithographs of manufacturers who dealt with independent plant owners was for the purpose of hampering and preventing such owners, including the plaintiff, from securing lithographs and posters, alleged:

"That thereby the said independents were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, competition with the association members and said conspirators was hindered and obstructed, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained."

This is not a definite allegation that appellants were unable to obtain posters or lithographs with which to execute their advertising contracts because of the activities of appellees or that advertisers seeking to deal with appellants were unable to secure posters for posting by appellants. If that was in fact the case, appellants should have alleged it to be so, definitely and clearly. An analysis of the complaint as a whole shows that the alleged damage to appellants flowed not from inability of appellants to obtain posters but from inability to obtain advertising contracts and billboard sites upon which to execute the same.[3]

[3]As we have stated, the alleged activities of the appellees complained of related principally to the obtaining of a monopoly of advertising sites and the securing of a monopoly of outdoor advertising contracts. As to damages, it is alleged:

"That the aforesaid acts, on the part of the defendant company and the other defendants herein named, were in unreasonable restraint of trade and commerce among the several states

We do not hold that because the ultimate object of a conspiracy is to obtain a monopoly of intrastate business or commerce such an object can be brought about by a restraint of interstate commerce

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and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its trade and competition with defendant in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned, to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby, from said year 1924 to the time of filing the complaint, and furthermore, as set forth more particularly in paragraph XV hereof, the plaintiff company has suffered great loss of profits and moneys invested and damage by reason of its inability to engage in said trade and commerce in the City of San Francisco and the State of California, all in the sum of three hundred and fifty thousand dollars ($350,000.00).

"Wherefore, plaintiff, C. E. Stevens Company, demands judgment against defendants for the sum of three hundred and fifty thousand dollars ($350,000.00), and treble damages, together with reasonable counsel fees, besides the costs and disbursements of this action."

without violating the Sherman Anti-Trust law. This is not the law. See, Bedford Cut Stone Co. v. Journeymen S. C. Ass'n., 274 U.S. 37, 47.

In the case at bar, as we have pointed out, although a conspiracy to control interstate trade in posters is alleged as one of the means of acquiring monopoly in the billposting business, it was not alleged that such a conspiracy to restrain the interstate movement of posters was effective and that appellants were damaged thereby. By the device of alleging a conspiracy to restrain interstate trade in posters and lithographs without alleging that this conspiracy was effective and worked to the damage of appellants, they cannot recover damages arising from the alleged conspiracy to prevent the acquisition and use of billboards and to obtain a monopoly of advertising contracts, activities intrastate in character, when it is clear that the purpose of the conspiracy as a whole is a monopoly of intrastate business.

In Ramsay Co. v. Associated Billposters, 260 U.S. 501, principally relied upon by appellants, the conspiracy charged was not only one to monopolize the billposting business in its intrastate aspects, but also one to "dominate and control all trade and commerce in posters" within such limits. And the manufacturers of posters had "by threats of withdrawal of patronage * * * been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms." Advertisers

were not permitted to purchase "stock" posters unless willing to have them displayed upon boards of members and independent billposters could not purchase such matter at all. Thus, there was present in that case the essential element absent in the case at bar, that is, an effective control of the interstate trade in posters. There would be, of course, some incidental effect on the interstate trade in posters and lithographs by the monopoly of the intrastate aspects of the outside advertising business. But the primary object of the conspiracy as alleged was the control of the intrastate business and such activities were outside the scope of the Sherman Anti-Trust law, supra. In Ramsay Co. v. Associated Billposters, supra, it was stated:

> "The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices."

In Bedford Cut Stone Co. v. Journeymen S. C. Ass'n., 274 U.S. 37, supra, it was stated:

> "The product against which the strikes were directed, it is true, had come to rest in the respective localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce, * * *; and interferences for a purely local object with its use, with no inten-

> tion, express or implied, to restrain interstate commerce, it may be assumed, would not have been a violation of the Anti-Trust Act * * *; United Mine Workers v. Coronado Co., 259 U.S. 344, 410-411. But these interferences were not thus in pursuit of a local motive,—they had for their primary aim restraint of the interstate sale and shipment of the commodity. Interstate commerce was the direct object of attack 'for the sake of which the several specific acts and courses of conduct [were] done and adopted.'"

In Coronado Coal Company v. United Mine Workers of America, 268 U.S. 295, 310, the Supreme Court said:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture of production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

See also, Local 167, etc. v. United States, 291 U.S. 293, 297. In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust

Act, supra, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting.

The other contention of appellants, that the outdoor advertising business as a whole must be considered as interstate commerce per se, was dealt with in our decision in Foster & Kleiser Co. v. Special Site Sign Co., supra. We found no merit in it. It is now contended, however, that under the "expanded concept of interstate commerce" as announced in recent decisions of the Supreme Court arising under the National Labor Relations Act, (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C.A. §151, et seq; N.L.R.B. v. Jones & Laughlin S. Corp., 301 U.S. 1; N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49; N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58; Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453; N.L.R.B. v. Fainblatt, 306 U.S. 601) a cause of action was stated under the Sherman Anti-Trust Act, supra.

Under the National Labor Relations Act, supra, the National Labor Relations Board is empowered to prevent certain described unfair labor practices affecting commerce. (§10 cf the Act, 29 USCA

§160(a)). The term "affecting commerce" is defined in the National Labor Relations Act as meaning "in commerce or, burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (§2 of the Act, 29 USCA §152(7)). The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of Congress to exercise control over activities which separately considered are intrastate but which, because of their close and susbtantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law.[4] As we have stated, the

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[4]Section 1 of the Sherman Anti-Trust Act, 15 USCA §1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, IN RESTRAINT OF TRADE OR COMMERCE

Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the primary purpose of monopolizing or restraining commerce among the several states, are not covered by such laws although such activities might incidentally affect interstate commerce. (United Mine Workers v. Coronado Co., 259 U.S. 344, supra; Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295; Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U.S. 37, supra; Local 167 v. United States, 291 U.S. 293, supra; Apex Hosiery Co. v. Leader, 90 F.2d. 155.)

The decisions of the Supreme Court in United States v. Rock Royal Co-operative, Inc., 59 S.Ct.

AMONG THE SEVERAL STATES, or with foreign nations, is declared to be illegal. * * *"

Section 2 of the Sherman Anti-Trust Act, 15 USCA §2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ANY PART OF THE TRADE OR COMMERCE AMONG THE SEVERAL STATES, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Section 1 of the Clayton Act, 38 Stat. 730, 15 USCA §12, provides:

"'Commerce,' as used in sections 12 to 27, inclusive, of this chapter, means trade or commerce among the several states * * *."

The Anti-Trust Act does not declare unlawful conspiracies to control local trade which may incidentally affect interstate commerce.

995, and Currin v. Wallace, 306 U.S. 1, cited by appellants, have to do with the validity of the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 USCA §601, et seq), and the Tobacco Inspection Act of August 23, 1935, (49 Stat. 731, 7 USCA §§511 to 511q) respectively, and have no bearing on the case at bar.

Appellants contend that even if the demurrer were properly sustained the court erred in dismissing the action without leave to further amend. Leave was granted to amend to clarify the complaint. No other amendment was requested. The appellees contend that in the absence of a request it was not error to refuse leave to amend, citing in support of their contention, Rule 15a of the Federal Rules of Civil Procedure, and Simpkins Federal Practice Rules of Civil Procedure, 3d ed. p. 313, §356. The amendment allowed to clarify certain terms used in the complaint did not substantially change the situation of the parties. The matter of giving leave to amend is one in the sound discretion of the trial court. But leave is to be "freely given when justice so requires". (Rule 15a, F.R. C.P., supra.) The reasons given by the trial court for denying leave to amend are persuasive here that there was no abuse of discretion.[5] We place

[5] "This case having on both sides and for a long time had the active attention of eminent counsel who have been advised of the progress and outcome of the similar cases herein and in the briefs cited, and plaintiffs' complaint having been amended

our decision sustaining the trial court in refusing leave to amend upon the ground that there was no abuse of discretion in such refusal and not upon the ground that appellants failed to request leave to amend after the court had announced that the demurrer to the complaint would be sustained without leave to amend.

Affirmed.

Healy, Circuit Judge, concurs in the result.

Haney, Circuit Judge, Dissenting.

Unable to agree with either the reasoning or the result obtaining in the majority opinion, I am constrained to dissent and hereby set forth my reasons therefor.

I dissent upon the ground that the majority too narrowly applies the Sherman Anti-Trust Act by reliance on Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F(2d) 742. I believe that case does not control here for two reasons. The first is that while the rule regarding the Congressional power over commerce has not been enlarged, the application of the exercise of the power, the anti-trust act, has been "expanded", as witness the Labor Board cases, cited in the majority opinion. Both the Sherman Anti-Trust Act, and the National Labor Relations Act cover not only interstate commerce, but intra-state activities which "directly"

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twice already, the demurrer to the second amended complaint will be as to all defendants sustained without leave to amend."

affect such commerce. Labor Board v. Jones & Laughlin, 301 U.S. 1, 37-41. There should be no discrimination in the application of the two acts. I do not agree with the majority in its differentiation with respect to the right and power of Congress to protect interstate commerce by means of the National Labor Relations Act on the one hand, and the scope of the Sherman Anti-Trust Act on the other. Both acts stem from the same constitutional source, each striving to protect the same kind of commerce. If possible they should each be construed to effectuate their purpose, but this cannot be done by applying diametrically opposed constructions, by seeking "mathematical or rigid formulas",[1] nor by applying distinctions based upon form and not upon substance.

In this connection, I think it should be stated that the majority's attempt to distinguish the labor board cases, on the ground that in such cases the court was considering the power of Congress over interstate commerce, whereas here we are merely considering the scope of the anti-trust act, seems to require little discussion. It was necessary to determine the scope of the National Labor Relations Act before its constitutionality could be determined. Labor Board v. Jones & Laughlin, supra, 29. Thus the same question was in fact considered in the labor board cases, as is presented here. The ma-

[1]Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467.

jority also state that intrastate activities, lacking an intent to violate the statute, are not within the anti-trust laws "although such activities might incidentally affect interstate commerce". The meaning of the statement is not quite clear. The phrase is broad enough to include an incidental "direct" effect upon interstate commerce, and if such meaning was intended, I think it is clearly erroneous.

The second reason why Foster & Kleiser Co. v. Special Site Sign Co., supra, is not controlling, is that when we are considering the applicability of an exercise of the Congressional power over commerce, I think each case must be decided on its own facts.[2]

A demurrer was sustained to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The complaint stated a cause of action if it alleged facts showing: (1) jurisdiction in the court over the subject-matter; (2) ownership of a right by appellants; (3) violation of such right by appellees; and (4) damage or injury to appellants resulting from such violation. United States v. McIntire, 9 Cir., 101

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[2]Compare: Sugar Institute v. United States, 297 U.S. 353, 600; Kansas City v. Kansas City Ry., 240 U.S. 227, 333; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85; Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467. It seems probable that it was upon this theory that Schechter Corp. v. United States, 295 U.S. 495, and Carter v. Carter Coal Co., 298 U.S. 238, were held to be "not controlling" in Labor Board v. Jones & Laughlin, 301 U.S. 1, 40. See also: Santa Cruz Co. v. Labor Board, 303 U.S. 453, 466, 469.

F(2d) 650, 653; United States v. Humboldt Lovelock Irr. Light & P. Co., 9 Cir., 97 F(2d) 38, 42. If these elements appear in the complaint, then the demurrer was erroneously sustained.

First. That the complaint states facts showing that the trial court had jurisdiction of the cause of action is not questioned and need not be discussed.

Second. The right claimed by appellants is to carry on its business free from injury caused by a violation of the Sherman Anti-Trust Act by appellees. 15 USCA §15. In other words, appellants had the right to be uninjured by a violation of the Sherman Anti-Trust Act, and if they were injured by a violation of such act by appellees, then appellees are liable. This element, (i.e., the ownership of such right by appellants) of necessity appears in the complaint.

Third. To determine whether appellees injured appellants by violating the Sherman Anti-Trust Act, it is necessary to determine what is prohibited by such act, and whether appellees took any prohibited action.

Prohibitions of the act. Section 1 of the act (15 USCA §1) declares illegal every "contract, combination * * * or conspiracy in restraint of trade or commerce" and declares it to be a misdemeanor for any person to "make any such contract or engage in any such combination or conspiracy". Section 2 (15 USCA §2) declares: "Every person who shall monopolize, or attempt to monopolize, or com-

bine or conspire with any other person or persons, to monopolize any part of the trade or commerce * * * shall be deemed guilty of a misdemeanor * * *" . While the meaning of the words "contract", "combination", "conspiracy", "combine", and "conspire" is not particularly recondite, the meaning of "in restraint of trade" and "monopolize" is more obscure, and it is the meaning of the latter words with which we are concerned.

It has been said that "no statute ever passed since the foundation of the government has been the subject of more difference of opinion or the cause of more perplexity" than the act in question,[3] and that it "is necessarily vague, because, in men's mind, the evil dreaded is vague, and like words, therefore, have been used to express it".[4]

The bill introduced by Senator Sherman regarding the subject was coolly received by the judiciary committee to which it was referred, and Senator Hoar drafted the bill which became the act in question. His statements, and the debates in Congress disclose that he intended that the words "restraint of trade" and "monopolize" should be given their

[3]William B. Hornblower, "Anti-Trust" Legislation and Litigation (1911), 11 Col. L. Rev. 701, 702.

[4]William F. Dana, "Monopoly" Under The National Anti-Trust Act (1894), 7 Harv. L. Rev. 338.

technical meaning known to the common law.[5] However, in the second case under the Sherman Act to come before the Supreme Court, it held that "debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body". United States v. Freight Association, 166 U.S. 290, 318. Compare the statement in Fed. Communications Comm. v. Pottsville Broadcasting Co., ... U.S. ..... January 29, 1940, that "the author of a document is ordinarily the authoritative interpreter of its purposes." If there was a committee report (a question which I am unable to determine here), and if it disclosed the intent mentioned, it is possible that such intent might yet be upheld, in view of the widespread use of such reports in the determination of Congressional intent.

Other than by the statements in Standard Oil Co. v. United States, 221 U.S. 1, the Supreme Court seems to have made no effort to distinguish between §§1 and 2 of the act.[6] It has been sug-

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[5]Robert L. Raymond, The Federal Anti-Trust Act (1910), 23 Harv. L. Rev. 353, n. 1;
Edward A. Adler, Monopolizing At Common Law And Under Section Two Of The Sherman Act (1917), 31 Harv. L. Rev. 246, 247-250;
Louis B. Bondin, The Sherman Act And Labor Disputes (1939), 39 Col. L. Rev. 1283, 1285 et seq.

[6]Clarence E. Eldridge, A New Interpretation Of The Sherman Act (1914), 13 Mich. L. Rev. 1 and 113.

gested that the technical common law meaning of the words in §§1 and 2 be used.[7] Accordingly it has been argued that §1 reaches only those restrictions placed *voluntarily* by one on his right to carry on his trade or calling, and that §2 reaches involuntary restraints.[8] Such theory, however, has been rejected.[9] It has also been suggested that "restraint of trade" is "the equivalent of restraint of competition".[10] That theory has likewise been rejected.[11] It has also been suggested that the word "monopolize" in §2, is synonymous with the common law offenses known as engrossing, forestalling and regrating.[12] That theory seems also to have been rejected[13]

What, then, is the meaning of "restraint of trade" and "monopolize"? By the statements that those words were "synonymous"[14] and reached "volun-

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[7]Eldridge, supra, note 6; Albert M. Kales, Good And Bad Trusts (1917), 30 Harv. L. Rev. 830, 843.

[8]Eldridge, supra, note 6.

[9]United States v. Patten, 226 U.S. 525, 541.

[10]Hornblower, supra, note 2, p. 705.

[11] Chicago Board of Trade v. United States, 246 U.S. 231, 238;
Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360;
Thornton, Combinations In Restraint Of Trade, 333, §147, 339a, §150a.

[12]Adler, supra, note 4, p. 259, 260.

[13]Standard Oil Co. v. United States, 221 U.S. 1, 57, 61.

[14]Standard Oil Co. v. United States, 221 U.S. 1, 61.

tary" as well as "involuntary" restraints,[15] the Supreme Court, as a practical matter, has, it seems, obliterated any distinction between §§1 and 2 of the act, and "has treated the prohibitions of Section 2 as substantially comprehended within the prohibitions of Section 1."[16] As a result of the language in Standard Oil Co. v. United States, 221 U.S. 1, 58-62, (which, if dicta, was deliberate), it seems that about all that can be said is that the statutes prohibit (1) the means of reaching a result, and (2) any attempt to reach such result; and the result mentioned is the evil thought to arise from the acts covered by the general words "restraint of trade" and "monopolize" mentioned therein, p. 52. Wilder Mfg. Co. v. Corn Products Co., 236 U.S. 165, 174.

Stating it more plainly, the statutes prohibit (1) the attempt to acquire, and (2) the acquisition of, power to fix unreasonable prices, unreasonably limit production, or unreasonably deteriorate the quality of articles, which might have a direct effect on interstate or foreign commerce. Considering the superb uncertainty and lack of precision in the rule, there seems to be justification for the statement that the "existing confusion as to the distinction between sections 1 and 2 of the act, and what

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[15]United States v. Patten, 226 U.S. 525, 541.

[16]See: Brief For The United States On The Meaning Of The Sherman Act, in United States v. Aluminum Company of America, Equity No. 85-73, in the United States District Court for the Southern District of New York.

the elements under each section are, would seem to invite and justify more specific statements from the Supreme Court with respect thereto". Lynch v. Magnavox Co., 9 Cir., 94 F(2d) 885, 888.

While the indefiniteness of the rule has been repeatedly and consistently decried[17] it is recognized that the application thereof may be settled only "by the traditional case-by-case method of our common law".[18] In that respect, the anti-trust statutes do not differ from any other statutes. The difficulties confronting the enforcing agency have been pointed out.[19] While some of these do not concern the judiciary, the charge of indefiniteness in the statement of the rule by the courts is one of serious import and should be rectified. However, since the decisions of the Supreme Court are binding on this court, such decisions prevent an expression of independent opinion as to the meaning of the statutes. I have set forth only what I believe the Supreme Court has stated the meaning of the statutes to be.

The alleged facts. Appellants are known as "independent" owners of plants used for outdoor advertising displays. Appellees are members of an

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[17]Anual Reports of the Attorney-General: for 1936, p. 21; for 1937, pp. 35, 39; for 1938, pp. 57, 59, 60.

[18]Annual Report of the Attorney-General for 1939, p. 39;
Thurman W. Arnold, Antitrust Activities Of The Department Of Justice (1939), 19 Ore. L. Rev. 22, 31.

[19]See note 15.

association and control 90% of the outdoor advertising in the Pacific Coast area. The complaint alleges that appellees entered into a conspiracy, the purposes of which were: to prevent appellants and others from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to appellants and others; and to prevent appellants and others from securing facilities to furnish an advertising service to advertisers.

From these allegations, it can be clearly seen that the end sought by appellees was the acquisition of power whereby they could fix unreasonable prices, and unreasonably limit the number of competitors.

The manner in which these objects were accomplished are alleged, but it is unnecessary here to relate them because the kind of means used is unimportant. The result of the means used is the thing of importance. In this connection it is alleged that appellees intended to restrain trade and monopolize when they formed the conspiracy and carried out the object thereof. If, by necessary operation of the conspiracy, there is an actual restraint, the statute is violated,[20] the actual intent being im-

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[20] Addyson Pipe & Steel Co. v. United States, 175 U.S. 211, 244;
Swift and Company v. United States, 196 U.S. 375, 395;
United States v. Reading, 226 U.S. 324, 357;
Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37, 46.

material.[21] Intent, however, is material when the acts done "tend" to reach the prohibited result.[22] If it is doubtful whether the acts actually "tend" to monopolize, it will be presumed that they do, if there is an actual intent to monopolize,[23] or if such an intent can be inferred from the extent of the control thereby secured over the commerce affected as well as by the method which was used.[24] I am not, therefore, in accord with the expressions of the majority with respect to rules regarding "intent" because if an actual restraint is accomplished, the intent with which either intrastate or interstate acts are done, is immaterial, and if the acts only "tend" to restrain, then the intent with which such acts are done is material regardless of whether the acts are intrastate or interstate in character.

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[21] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 39;
United States v. Patten, 226 U.S. 525, 541;
Thomsen v. Cayser, 243 U.S. 66, 88;
Paramount Famous Corp. v. United States, 282 U.S. 30, 44.

[22] United States v. American Oil Co., 262 U.S. 371, 388;
Maple Flooring Ass'n v. United States, 268 U.S. 563, 567;
Thornton, Combinations In Restraint Of Trade, 417b, §200.

[23] Swift and Company v. United States, 196 U.S. 375, 395;
Coronado Co. v. U. M. Workers, 268 U.S. 295, 310.

[24] United States v. St. Louis Terminal, 224 U.S. 383, 394;
United States v. Reading, 226 U.S. 324, 357.

The trade or commerce affected must be interstate or international,[25] and the effect thereon must be direct or immediate, and not indirect or incidental.[26] We must therefore determine whether accomplishment of the object of the conspiracy had such an effect here. The majority, in my opinion, has confused the "purpose" of the conspiracy with the means used to "accomplish" it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial.[27] "It is the effect upon commerce, not the source of the injury, which is the criterion".[28] Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.[29]

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[25]United States v. Joint Traffic Association, 171 U.S. 505, 568;
Anderson v. United States, 171 U.S. 604, 615;
United States v. Patten, 226 U.S. 525, 542;
Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436, 441.

[26]United States v. Joint Traffic Association, 171 U.S. 505, 568;
Anderson v. United States, 171 U.S. 604, 615;
United States v. Patten, 226 U.S. 525, 545.

[27]Labor Board v. Jones & Laughlin, 301 U.S. 1, 37, 38;
Santa Cruz Co. v. Labor Board, 303 U.S. 453, 466.

[28]Labor Board v. Jones & Laughlin, supra, 32.

[29]Labor Board v. Jones & Laughlin, supra, 32;
Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467.

The complaint contains many allegations that the accomplishment of the conspiracy "obstructed and hindered" appellants in their business; and that "the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained". It was also alleged that "in almost every case" the poster advertising contracts were "agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state". It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of Santa Cruz Co. v. Labor Board, supra, and Edison Co. v. Labor Board, 305 U.S. 197, 221, I think it inevitably follows that the effect was "direct".

Fourth. The last element of the cause of action, mentioned above, is the damage or injury to appellants resulting from the violation of the statute by appellees. I am not in accord with the holding of the majority, that there are no allegations to show that the conspiracy injured appellants' business. The following quotation, in my opinion, clearly controverts such holding:

> "That the aforesaid acts * * * did constitute a monopoly * * * greatly to the damage of * * * [appellants], and that the [appellants] company was unreasonably restrained in

its trade and competition with [appellees] in the outdoor advertising business * * * all of which was injurious to the [appellants] company and excluded [it] * * * from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce * * * the [appellants] company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and * * * [it] has suffered loss and been damaged thereby * * *"

In addition there are other allegations of injury.

For these reasons I think the judgment should be reversed.

[Endorsed]: Opinion, Concurrence and Dissenting Opinion. Filed Feb. 19, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9215

C. E. STEVENS COMPANY, a corporation, et al.,
Appellants,

vs.

FOSTER & KLEISER CO., a corporation, et al.,
Appellees.

JUDGMENT

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered and adjudged by this Court that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Feb. 19, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Jones & Bronson counsel for the appellants, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 8, 1940; and in the event the petition for a writ of certiorari to be made by the appellants herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

BERT EMORY HANEY
United States Circuit Judge

Dated: San Francisco, California,
March 21, 1940.

[Endorsed]: Filed Mar. 21, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred twelve (112) pages, numbered from and including 1 to and including 112, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of March, 1940.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following No. 870, The United States of America vs. Hutcheson, et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9420)

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APR 3 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 41

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation, *Petitioners*,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST T. LAUSEN, JR.; ALBERT MORTENSON; COLMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

H. B. JONES,
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Seattle, Washington.

JONES & BRONSON,
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Seattle, Washington.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.....

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation, *Petitioners*,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of C. E. STEVENS COMPANY, C. E. STEVENS TACOMA COMPANY and C. E. STEVENS COMPANY OF OREGON, respectfully sets forth the following:

SUMMARY STATEMENT OF MATTER INVOLVED

The controlling issue involved in the present case is whether the actions of the respondents, as set forth in the second amended complaint, constitute a re-

straint of commerce in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. (popularly known as the Sherman Act).

This action for treble damages under the Sherman Act was instituted February 27, 1933, in the District Court for the Western District of Washington, Northern Division. Demurrer for want of facts and lack of jurisdiction was submitted and overruled but at the same time certain motions were granted resulting in the filing of an amended complaint. Upon answer thereto and reply, the cause stood at issue awaiting assignment for trial for an extended period during which time the Circuit Court of Appeals for the Ninth Circuit decided *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742.

Thereupon respondents moved for a reconsideration by way of motion to dismiss, which, after hearing, was granted with leave to amend, resulting in the filing of the second amended complaint on March 30, 1938. This was followed by a demurrer upon the part of the respondents which was sustained without leave to amend on the authority of the *Special Site* case, and judgment of dismissal entered on June 8, 1939 (R. 54), from which appeal was taken to the Circuit Court of Appeals for the Ninth Circuit.

On February 19, 1940, the Circuit Court affirmed the judgment of the District Court in an opinion by Judge Wilbur, who wrote the *Special Site* decision, with Judge Healy concurring in the result (R. 8[illegible]). Judge Haney, who had concurred in *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir.) 85 F. (2d) 742, which was the basis of the majority opinion, wrote a

vigorous dissent upholding the sufficiency of the complaint and disapproving the application of the *Special Site* decision to this case (R. 97).

The complaint pleads and the demurrer admits the following facts: Petitioners are owners and operators of plants used for outdoor advertising displays in Washington and Oregon (R. 3, 45, 47). Respondent, Foster & Kleiser Co., is engaged in the same business on a national scale (R. 6-8) and controls ninety per cent of the outdoor advertising in the states comprising the Pacific Coast area (R. 36). The remaining respondents are, Restop Realty Co., a corporation, owned and controlled by Foster & Kleiser Co., and its officers and directors, and various officers, stockholders and employees of the two corporations (R. 8-10).

The outdoor advertising business, as carried on by the parties to the action, is a nationwide business, which in several essential respects depends upon commerce between the states. The advertiser generally contracts with the lithographer (practically all of whom are located in Kentucky, Ohio and Illinois) for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards (R. 17). These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. (R. 27). This bureau contracts with bill posting companies called "plant owners," who control sites for bill boards, for the execution of the contracts secured by the agencies (R. 28-29). Since 1927 certain bill posting companies have been organized into the Out-

door Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America (R. 21). These associations grant to their members a single "franchise" for billboard display in each community where a member plant is located, and direct all advertising which they control to such member plant. The Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs to anyone for display on independent display plant owners' billboards, petitioners being such independents. The Association also refuses to post billboard advertising on the boards belonging to its members for advertisers who permit their advertising to be displayed on billboards belonging to such independent display plant owners (R. 21-26). Foster & Kleiser Co. controls 600 franchises and the General Outdoor Advertising Company, Inc., incorporated in 1924 in furtherance of the conspiracy, controls 1,000 franchises (R. 34). Foster & Kleiser Investment Company, a corporation, whose stock is owned by respondents, George W. Kleiser and Walter P. Foster, purchased 50,000 shares of stock of General Outdoor Advertising Company, Inc., for $1,000,000 and George W. Kleiser became a director of the latter company (R. 32-33). The Outdoor Advertising Association, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. (R. 34-35). The respondent, George W. Kleiser, was a director and for many years president of the Outdoor Advertising Association, Inc. (R. 34). The

petitioners are "independent" operators kept from membership in and the benefits of the Outdoor Advertising Association of America, Inc., by the conspirators (R. 24).

In almost every case the poster advertising contracts, frequently directly solicited by the respondents or petitioners from advertisers located throughout the United States, are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one state to another for the primary purpose of posting or painting them on bill boards or paint panels supplied by the display plants such as petitioners or respondents under the terms of the contracts (R. 4-8).

Respondents intentionally entered into a nation-wide conspiracy, the purposes of which are to monopolize the outdoor advertising business in the Pacific Coast area; to prevent petitioners and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to petitioners and others; and to prevent petitioners and others from securing facilities to furnish an advertising service to advertisers (R. 18-19).

The general plan, scheme and conspiracy is designed and operated to effect such monopoly by:

1. Control of the business of national outdoor advertising at its source through control of the agencies and organizations placing the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the furnishing or sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained, by the plaintiff company and other competitors, by means of various unfair, predatory and illegal acts, which are referred to as local predatory acts, designed to prevent petitioners from securing posters or facilities to furnish an advertising service to advertisers (R. 19-20).

The conspiracy disclosed is substantially identical with that outlined in the opinion in *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, which this Court held to be within the scope of the Sherman Act. The respondents admitted, in their brief below, that the complaint alleges a conspiracy within the *Ramsay* decision (R. 87). The majority opinion apparently recognizes that the *Ramsay* decision would govern this case but for its view that the acts which injured the petitioners' business and prevented the obtaining of contracts or posters were not "done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce" (R. 93).

As a result of the respondents' control over the Outdoor Advertising Association of America, Inc. (R. 21-26) and the National Outdoor Advertising Bu-

reau, Inc. (R. 30-31, 33-34) the conspiracy with General Outdoor Advertising Company and the acts effectuating the conspiracy (R. 32-36, 36-42), practically all national outdoor advertising business in the Pacific Coast Area was and is placed for execution upon the plants of Foster & Kleiser Co., to the exclusion of independent plants, including the petitioners' plants, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was and is thereby monopolized, restricted, curtailed and unreasonably restrained (R. 35-36).

These various acts enabled the respondents to bring about a monopoly greatly damaging petitioners' business. Petitioners are unreasonably restrained in their trade and competition with respondents in the outdoor advertising business, all of which is injurious to petitioners and excludes them from fair competition in such trade and commerce (R. 23, 24, 25, 26, 31, 33-34, 35-36, 41-42). Because of such inability to compete in the trade and commerce, petitioners have been damaged in that their business has been rendered unprofitable and their profits have diminished and they have suffered loss and damage thereby (R. 43-49).

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C.A., Sec. 347 (a)).

2. The date of the judgment of the Circuit Court

of Appeals for the Ninth Circuit herein sought to be reviewed is February 19, 1940.

QUESTIONS PRESENTED

1. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding that, since the main purpose of the conspirators was to secure control of the intrastate aspects of the business, their intent to restrain and their actual restraint of interstate commerce by preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain or execute contracts involving the interstate shipment of the posters and lithographs was not within the scope of the Sherman Act? It held that "the act does not declare unlawful conspiracies to control local trade which may incidentally affect interstate commerce" (R. 95...) even where interference with interstate commerce is deliberately intended and directly produced.

2. Did not the Circuit Court err in holding that the complaint failed to allege with sufficient definiteness and clearness that petitioners by reason of the primary aim of the monopoly were unable to secure posters or lithographs with which to execute their advertising contracts or that advertisers seeking to deal with petitioners were unable to secure posters for posting by petitioners?

3. Did not the Circuit Court err in holding that the outdoor advertising business of the parties hereto, as explained and set forth in the complaint, is not

interstate commerce and that the restraint thereof is not a violation of the Sherman Act?

4. Has not the scope of the Sherman Act been "expanded" so as to cover intrastate activities, such as set forth in the complaint, which "directly affect interstate commerce"? Judge Wilbur holds not. Judge Haney says it has. The point is directly involved in *Apex Hosiery Co. v. Leader*, No. 638, October Term; Certiorari granted February 26, 1940.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Ninth Circuit that the effect on interstate commerce of respondents' monopoly of the outdoor advertising business and its ruinous effect upon petitioners' business were indirect and remote is in plain conflict with the decisions of this Court, holding such monopoly to be a direct restraint and burden upon interstate commerce.

2. The decision of the Circuit Court of Appeals for the Ninth Circuit that, since the main object of the conspiracy is to gain control of intrastate aspects of a business, an intent to restrain and obstruct the aspects of the business involving interstate commerce is not such a primary intent as to bring the case within the scope of the Sherman Act is in plain conflict with decisions of this Court holding such an intent to be within the scope of the Sherman Act.

3. *Foster & Kleiser Co. v. Special Site Sign Co.*

(9th Cir.) 85 F. (2d) 742, is not controlling under the different facts of the instant case.

4. The outdoor advertising business, as explained and set forth in the complaint, substantially involves interstate commerce, and a conspiracy to restrain or monopolize it is within the scope of the Sherman Act.

5. The instant case is within the Sherman Act since the scope of that act has been extended by the several decisions of this Court which hold that Congressional power over commerce extends to cover not only interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

6. The Circuit Court of Appeals for the Ninth Circuit has decided a question of national importance in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court for the Ninth Circuit, commanding that Court to certify and send to this Court on the date to be designated in said Writ, full and complete transcript of record of all proceedings in this case numbered and titled on its docket "No. 9215, September Term, 1939, *C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, Appellants, v. Foster & Kleiser Co., a corporation, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., Albert Mortenson, Gilman Haynes, Restop Realty Co., a corporation, Gerald O'Neil, Lyle Abrahamson, Paul Dueber, Walter Stevens and George Smith, Appellees,*" to the end that said case may be reviewed

and determined by this Court as provided by law and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

Dated Seattle, Washington, March 25, 1940.

C. E. STEVENS COMPANY,
C. E. STEVENS TACOMA COMPANY,
C. E. STEVENS COMPANY OF OREGON,
By H. B. Jones,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.....

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation, *Petitioners*,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH, *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The ruling of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to the second amended complaint without leave to amend was filed April 26, 1939, and has not been officially reported. It appears in the record at page 54.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed February 19, 1940, and has not been officially reported. It appears at the end of the record (R. 81).

For the sake of brevity we refer to the preceding petition for the following:

JURISDICTION . . . . . (*supra*, page 7); and,

STATEMENT OF THE CASE (*supra*, pages 1-7).

ASSIGNMENTS OF ERROR

I. The Circuit Court of Appeals erred in holding that since the main object of the conspiracy is to gain control of intrastate activities of the outdoor advertising business, the intent to accomplish that purpose by restraint upon and actual restraint of interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (9th Cir.) 85 F. (2d) 742, is not controlling because the facts of the instant case are substantially different from those of the reported case. The Circuit Court erred in holding it was controlling.

III. The outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

IV. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

ARGUMENT

I. The Circuit Court of Appeals Erred in Holding That Since the Main Object of the Conspiracy is to Gain Control of Intrastate Aspects of the Outdoor Advertising Business, the Intent to Accomplish That Purpose by Restraint Upon and Actual Restraint of Interstate Commerce Through Preventing Posters and Lithographs From Other States Reaching Petitioners or by so Crippling Petitioners' Business Facilities as to Destroy Their Ability to Obtain and Execute Contracts Involving the Interstate Shipment of Posters and Lithographs Is Not Within the Scope of the Sherman Act.

In affirming the judgment entered by the District Court the Circuit Court of Appeals stated (R. 92):

> "In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, *supra*, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the con-

trol of the local business of securing advertising contracts and billposting."[1]

The quoted holding of the Circuit Court is in error for three reasons.

---

[1]The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209).

"Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731)."

A. The first is that the Court ignores the distinction between Sections 1 and 2 of the Sherman Act. Under Section 1 the conspiracy and the resulting restraint upon interstate commerce are sufficient. The intent actuating the conspiracy is immaterial. It is only under Section 2 that the intent of the conspirators in monopolizing or attempting to monopolize the interstate commerce becomes material. The rule is succinctly stated by Judge Haney in the instant case at page 17 of the dissenting opinion:

> "If, by necessary operation of the conspiracy, there is an actual restraint the statute is violated, the actual intent being immaterial." (R. 106).
>
> *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49;
>
> *Paramount Famous Corp. v. United States*, 282 U. S. 30, 49.

Admittedly (R. 90) the complaint pleads a violation of Section 1 by conspiracy to restrict national outdoor advertising in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly movements of posters, lithographs, stencils and other physical paraphernalia connected therewith. It is not necessary to *stop* the interstate movement to give rise to a liability; it is sufficient that it is *diverted or restricted* to certain desired channels, which was the purpose of this conspiracy.

> *Ramsay Co. v. Associated Billposters*, 260 U. S. 501; 43 S. Ct. 167, 67 L. ed. 368.

Judge Wilbur holds that, while the complaint does state a conspiracy to restrain interstate commerce, such restraint was not the primary object of the con-

spiracy. Therefore any injury to petitioners is not compensable under the Sherman Act because it results from a primary aim to monopolize the intrastate aspects of the business (R. 90). In considering this point it is important to remember that it is not essential that either the plaintiff's business which is damaged or the business of the defendants constitute interstate commerce.

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
>
> *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> *Schechter v. United States*, 295 U. S. 495, at 544.

It is also important to remember that wherever the terms "independents", "independent plant owners", "independent plants" and "independent companies" are found in the complaint they include and are intended to embrace the appropriate petitioner (R. 19).

Illustrating that the complaint does clearly and definitely plead the existence of the conspiracy to

monopolize the business by restraint upon interstate commerce and the resultant restraint and injury to petitioners' business, we call attention to some of the allegations. Respondents, through the Outdoor Advertising Association of America, Inc. (hereinafter called the Association), and its predecessors, which they controlled by means of their agreement with General Outdoor Advertising Company (hereinafter called the General Company) (R. 32-34), intending to prevent petitioners obtaining posters from other states, refused to post lithographs if the lithographers sold lithographs to petitioners. This refusal successfully intimidated and coerced the lithographers. As a result the free movement in interstate commerce of the posters, lithographs, printed designs, and contracts for outdoor advertising were monopolized and unreasonably restrained, and petitioners were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, and competition was lessened (R. 23, 25-26). In the same manner advertisers were forced to deal with respondents and not with petitioners (R. 23-26, 36). An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them. Every effort of the respondents through the Association (R. 21-26), the National Outdoor Advertising Bureau (R. 26-29, 30-31, 33-36), the community of interest and actual physical and financial contact with the General Company (R. 32-36) and the so-called local predatory acts (R. 36-42) was directed

toward accomplishing a monopoly of the outdoor advertising business in the Pacific Coast area by directly preventing posters and lithographs being shipped from other states to petitioners or by so crippling petitioners' business and facilities that no one would want to ship posters and lithographs to them because they would be unable to render proper and adequate service.

By burdening and restraining interstate commerce these efforts did accomplish the monopoly just as the respondents planned and they control over ninety per cent of the business in the Pacific Coast area. This monopoly was effected because, as planned, the interstate commerce in posters was burdened and restrained (R. 23, 26, 29, 31, 34, 35-36, 37-42, 42-44).

The conspiracy and the acts furthering it did "work to the damage of" petitioners (R. 44, 45, 46-47, 48).

Judge Haney concurred in the opinion in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, which held there was no direct causal connection between the acts of the conspirators and the injury complained of. The majority treats that case as controlling here. In considering whether the direct causal connection between the acts of the conspirators and the injurious effect upon petitioners is alleged in this complaint, Judge Haney states:

> "The majority, in my opinion, has confused the 'purpose' of the conspiracy with the means used to 'accomplish' it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial. 'It is the effect upon commerce, not the

source of the injury, which is the criterion.' Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.

"The complaint contains many allegations that the accomplishment of the conspiracy 'obstructed and hindered' appellants in their business; and that 'the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.' It was also alleged that 'in almost every case' the poster advertising contracts were 'agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state.' It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of *Santa Cruz Co. v. Labor Board, supra*, and *Edison Co. v. Labor Board*, 305 U. S. 197, 221, I think it inevitably follows that the effect was 'direct'." (R. 108.)

B. The second reason why the quoted holding is in error is that it is based upon an incomplete analysis of the conspiracy and the means adopted to accomplish it. It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another.

To control this interstate shipment they entered into a nation-wide agreement with the other two powerful combines in the business. Through purchasing stock in the General Company and electing the respondent, George W. Kleiser, to the board of that company (R. 32-33) respondents assumed a position where it was easy for them to obstruct and hinder the interstate shipment of the posters and lithographs by applying pressure on lithographers in the Middle West and on advertisers all over the country. In view of such a complex and successful plan operating throughout the United States respondents cannot maintain that their conspiracy was limited in its application to the intrastate aspects of the outdoor advertising business.

C. The third and most important error in the quoted passage is in confusing the means used by the conspirators with their ultimate ends. This is apparent from the majority's use of the word "intent" as the equivalent of the word "purpose" or "object." The ultimate "purpose" or "object" of the conspirators in all cases involving violations of the Sherman Act, is to benefit themselves materially by unreasonably limiting competition and thus acquiring the power unreasonably to fix prices, a matter which may be primarily local (R. 164). In that sense the ultimate purpose or object in the *Stevens* case is the same as it was in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368. However, an examination of the cases cited by the majority in support of its holding (R. 90-93) discloses that the intent with which the restraint upon inter-

state commerce is effected is not to be confused with the ultimate purpose of the conspirators.

In *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, the conspirators were not only billposters, as in the instant case, but the association they formed to assist in the accomplishment of their conspiracy was a predecessor of the Association in this case (R. 21) and was created for like purposes. They combined and conspired to monopolize the outdoor advertising business in their respective localities and to dominate and control all trade and commerce in posters within such limits. Thus, as in the instant case, their main object or purpose was to monopolize the outdoor advertising business. They *intended* to bring this about by dominating and controlling the interstate trade in posters. Thus in the *Ramsay* case and in this, the Stevens complaint, the intent to accomplish the monopoly by restraining interstate commerce is the same. To carry out the conspiracy the Associated Billposters adopted the same restraints and burdens upon the interstate trade, as such, and upon their competitors. Plaintiffs, in the *Ramsay* case, like petitioners here (R. 4, 15-17) solicited outdoor advertising contracts and prepared, designed, purchased and displayed lithographs and posters. As a result of the conspiracy plaintiffs were prevented from competing in the markets, and their business was restricted and unprofitable. In discussing the case this Court said at page 511 of the decision:

> "The court below held: 'The business of the solicitors is to send their customers advertise-

ments to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'

"*We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiff, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and plaintiff's business has suffered." (Emphasis supplied)

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 511, 43 S. Ct. 167, 67 L. ed. 368, 370.

In *Bedford Cut Stone Co. v. Journeymen S. C. Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916, the company had ceased to operate a closed shop and employ the union's members, all stonecutters. The union called a national strike directing all of its members to refuse to work on any job where the stone had been quarried or worked upon by non-union men. The resultant walk-offs affected building operations purely local in character. The union raised the argument that its primary purpose was to unionize the cutters and carvers at the quarry. This Court held:

> "Respondents' chief contention is that 'their sole and only purpose * * * was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioner's product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A restraining of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they

might have been at liberty to pursue by means not involving such restraint."

Bedford Cut Stone Co. v. Journeymen S. C. Assoc., 274 U. S. 37, 47, 47 S. Ct. 522, 71 L. ed. 916, 921.

In the second *United Mine Workers* case (*United Mine Workers v. Coronado Coal Co.*, 268 U. S. 295, 69 L. ed. 963, 45 S. Ct. 551) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an *intent* to accomplish this ultimate purpose by restraining interstate commerce. In discussing the question this Court said:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act.*" (Emphasis supplied)

United Mine Workers v. Coronado Coal Co., 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551.

The majority opinion in the Circuit Court of Appeals also calls attention to *Local 167, I. B. T. etc. v. United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396. Marketmen, who acted as wholesalers of the continuous stream of live poultry pouring into New York, purchased the poultry and sold it to retailers

after interstate transit had ceased. They organized a Chamber of Commerce with the ultimate purpose of monopolizing the business and increasing prices. They engaged in many acts to control the handling, the sales and the price of the poultry. They denied that they intended to restrain or did interfere with interstate commerce. In approving the granting of the injunction this Court held:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. * * * But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * * The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. * * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and move-

ment of the poultry while unquestionably it is in interstate commerce."

Local 167, I. B. T., etc. v. United States, 291 U. S. 293, 297, 78 L. ed. 804, 808, 54 S. Ct. 396.

An allegation of the purpose or intent with which an act or series of acts is done is an allegation of fact good upon demurrer. 49 C. J. p. 57, par. 51. Intent may be averred generally. Federal Rules of Civil Procedure, Rule 9 (b).

This analysis of the cases cited by the majority opinion as authority for the quoted passage (*supra* 14) indicates that in each case, as here, while the *ultimate purpose or object* was to monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And, in each case, the presence of this intent was the element which brought the case within the scope of the Sherman Act. The majority has failed to distinguish between ultimate ulterior purpose and the intent to accomplish such purpose by a restraint upon interstate commerce forbidden by the Sherman Act.

Therefore, it is respectfully submitted that the Circuit Court of Appeals erred in holding that since the ultimate purpose of the conspiracy is to gain control of the intrastate aspects of the outdoor advertising business, the intent to accomplish that purpose by means of restraint upon interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their

ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (9th Cir.) 85 F. (2d) 742, Is Not Controlling Because the Facts of the Instant Case Are Substantially Different From Those of the Reported Case.

This Court has held that in the determination of whether or not a particular case falls within the purview of the Sherman Act, each case must be considered on its own facts.

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts."
>
> *Sugar Institute v. United States*, 297 U. S. 563, 600, 80 L. ed. 859, 876, 56 S. Ct. 629.

The essence of the *Special Site* decision seems to be this: Bill posting, *as alleged in the complaint*, is local in character. Shipments made by the defendant from itself in one state to itself in another state of materials used in bill posting cannot be the subject of a conspiracy to restrict interstate commerce. The defendant could not conspire with itself. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). There were no allegations that the defendant had anything whatever to do with the shipment of posters or their movement in interstate commerce. The transportation of the necessary posters and lithographs in interstate commerce was not alleged to be related to

or involved in any way in the defendant's bill posting business. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). The parties and activities in that case were substantially confined to the State of California. The theory of the *Special Site* complaint was that if the parties locally displayed posters or lithographs which had been the subject of interstate transportation and the defendant committed local acts of depredation tending to interfere with plaintiff's local display, such acts and interferences, through the resulting effect upon interstate commerce, constituted a violation of the Sherman Act. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750). In holding that this theory was erroneous, the court pointed out that the interference with interstate commerce, which is subject to the act, must be direct and not merely an indirect resulting effect. The court was of the opinion that since there were no allegations that defendant had conspired with another to directly restrain transportation between one state and another, or was monopolizing the business so as to produce that direct effect, the local acts of depredation complained of were not violative of the Sherman Act, and that interstate commerce was not involved simply because posters or other materials were shipped between states by parties with whom the defendant had no relation.

> "In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-Trust Act."
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 754.

In that case the means alleged to have been used to restrain interstate commerce, consisting primarily of local acts of a competitive nature between parties who were residents of the same state, were, the Court said, "adopted to the injury or destruction of the plaintiffs' business in its intrastate aspects," and none of them "are *alleged* to have directly affected the interstate trade in posters or lithographs" (Emphasis supplied).

The situation thus disclosed by the *Special Site* decision is far from similar to the nationwide conspiracy factually alleged in the *Stevens* complaint. Respondents are engaged in business on a national scale (R. 6-8) actively preparing, designing, purchasing and displaying posters and lithographs (R. 15-17). They enter into thousands of contracts actuating the interstate shipment of the posters and lithographs for display upon billboards controlled by them in several states, and in many cases for display upon designated boards (R. 11-12). Respondents entered into and are carrying out a conspiracy to monopolize the outdoor advertising business and this monopoly is intended to be effected by restraint upon the interstate commerce in posters and lithographs in two respects. The first is to restrain such commerce by utilizing the Association, the Bureau, and the "tie-ups" with the General Company to force lithographers and advertisers to cease sending posters and lithographs to petitioners in the states in which they do business and to send those posters and lithographs to respondents (R. 20, 21-26, 29, 32-36). The second is to institute a series of so-called local predatory acts which

will so cripple petitioners' business facilities as to destroy their ability to procure and execute contracts involving interstate shipment of the posters and lithographs so that advertisers will deal only with respondents (R. 18-20, 36-42). These efforts to accomplish the monopoly by restraining interstate commerce are entirely successful as planned by the conspirators. They now control over 90% of the outdoor advertising business in the Pacific Coast area (R. 23, 26, 29, 31, 34, 35-36, 37-42, 42-44).

It is, therefore, respectfully submitted that the Circuit Court erred in holding that *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, in any sense controls the instant case.

The action of this Court in denying certiorari in *Special Site Sign Company v. Foster & Kleiser Company*, 299 U. S. 613, 81 L. ed. 452, 57 S. Ct. 315, should not be regarded as significant both because of the oft-repeated admonitions of this Court to this effect and also because the order of the Circuit Court of Appeals in that case was not a final one but remanded the case with leave to amend and for further proceedings.

III. The Outdoor Advertising Business, as Factually Explained and Set Forth in the Second Amended Complaint, Substantially Involves Interstate Commerce, and a Conspiracy to Restrain or Monopolize It Directly Restrains and Monopolizes Interstate Commerce and is Within the Scope of the Sherman Act.

In a footnote to the opinion (R. 86) the court says:

> "Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. *Ware and Leland v. Mobile County*, 209 U. S. 405; *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436; *Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91." (*Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916).

Strictly speaking petitioners admit that this statement is true so far as it goes. However the cases cited are inapplicable to the situation now before this Court. In none of those cases did the court decide that a nation-wide business of preparing, designing, purchasing and displaying posters and lithographs in the course of which thousands of contracts arose *actuating* the interstate shipment of these posters and lithographs for display on specified billboards was an *intrastate* business not substantially involving interstate commerce. The only cited case which concerned the application of the Sherman Act is *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436. Only Section 2 of the Act was involved (See *supra*, page 15, for distinction between Sections 1 and 2).

In that case this Court held that the advertising contracts which the plaintiff advertising agent offered the defendant publisher and which the latter refused to accept had no direct relation to the circulation of the magazines in interstate commerce. That ruling is inapplicable here for the reasons previously stated (*supra*, page 28).

Further, the *Special Site* case rests its ruling that the billposting business is not interstate in character upon this Court's ruling in *Packer Corp. v. State of Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643. The latter case involved a state statute prohibiting the posting of tobacco advertising in Utah. It was aimed at the use of the poster *after* it was affixed to the billboard. No facts appeared in that case to support a finding that the defendant was engaged in a business substantially involving interstate commerce, or that its nationwide illegal combinations had made it substantially interstate in character. These allegations are present in the Stevens complaint. Consequently, the *Packer* decision is inapplicable to this case. It does not generally and finally determine that every outdoor advertising business is strictly intrastate in character.

Therefore, it is respectfully submitted that the Circuit Court erred in not holding that the outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce. It is obvious that since it does substantially involve interstate commerce the restraint upon and monopolization of it are within the scope of the Sherman Act.

IV. The Instant Case is Within the Sherman Act Since the Scope of That Act Has Been Extended by the Several Decisions of This Court Which Hold That Congressional Power Over Commerce Extends to Cover Not Only Interstate Commerce, as Such, But Intrastate Activities Which "Directly" Affect Such Commerce.

The congressional power over commerce is governed by the Constitution, Art. 1, Sec. 8. Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U.S.C.A. §151 *et seq.*), the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U.S.C.A. §601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U.S.C.A. §511 to 511q). The scope of each of these acts has been passed upon by this Court.

National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. ed. 1014;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

This Court in the first cited case announced what has come to be known as the expanded concept of interstate commerce in the following words:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement;' * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, 223 U. S. 51, 56 L. ed. 345, 32 S. Ct. 169.
>
> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."
>
> *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 37, 57 S. Ct. 615, 81 L. ed. 893, 911.
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> * * * * * *
>
> "It is thus apparent that the fact that the em-

ployees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 40, 81 L. ed. 913.

* * * * * *

"* * * In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. *When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?* We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience." (Emphasis supplied) 301 U. S. 41, 81 L. ed. 914.

Where local transactions are so inextricably

mingled with and directly affect the admitted interstate transactions they, too, are subject to Federal authority. The local transactions are caught up in the current of interstate commerce or their manipulation is capable of directly affecting, burdening and obstructing the interstate commerce and thus they become subject to Federal regulation. This view is further expressed in the following cases:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, ... U. S. ...., 60 S. Ct. 107, 84 L. ed. 86;

Edwards v. United States, 91 F. (2d) 767;

United States v. Wilshire, 9 F. Supp. 396, aff. 77 F. (2d) 1022.

This court has indicated in *Interstate Circuit, Inc., et al. v. U. S.*, ... U. S. ....., 59 S. Ct. 467, 83 L. ed. 444, that, in circumstances strikingly similar to those in the instant case, the theory of the expanded application of Congressional power over commerce applies in cases involving violations of the Sherman Act.

Under the foregoing decisions of this Court, even if respondents' business and the acts they engaged in to further their conspiracy are intrastate in character, their activities did have a direct effect upon the interstate trade in posters and lithographs. In view of this direct restraint upon that commerce their illegal intent (which has never been denied by respondents) will be presumed. The injury they have caused peti-

tioners' business is thus compensable under the Sherman Act.

As in *Apex Hosiery Co. v. Leader*, No. 638, October Term, before this Court on certiorari granted February 26, 1940, the Circuit Court in the instant case failed to follow the express ruling of this Court in the foregoing cases on the ground that the term "affecting commerce" has a broader connotation than the term "in restraint of trade or commerce among the several States." Its view was:

> "* * * The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of Congress to exercise control over activities which separately considered are intrastate but which, because of their close and substantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law. As we have stated, the Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the *primary* purpose of monopolizing or restraining commerce among the sev-

eral states, are not covered by such laws although such activities might incidentally affect interstate commerce." (R. 94) (Emphasis supplied)

Such a holding ignores firstly the fact that all the legislation under discussion is based upon the same constitutional provision and each act seeks to protect the same kind of commerce. There should be no differentiation between the different degrees of that commerce each does protect. Secondly, it ignores the definition of the term "affecting commerce" as including "burdening or obstructing commerce," which has always been considered by this Court as synonymous with "restraining commerce." Finally it ignores the above-cited decisions of this Court that, irrespective of the terms used in the particular statutes, the intrastate acts complained of had a direct effect upon interstate commerce, even though those acts, separately considered, were local in character.

It is therefore respectfully submitted that the Circuit Court erred in not holding that the application of Congressional power over commerce, insofar as the Sherman Act is concerned, has been extended by the recent decisions of this Court to cover not only interstate commerce, as such, but the intrastate activities of these respondents which directly affect such commerce.

CONCLUSION

In conclusion it is respectfully submitted that this case is one particularly appropriate for review by this Court, since:

(A) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in posters and lithographs.

(B) As a result of respondents' conspiracy and acts in furtherance thereof, there was a direct restraint upon interstate commerce, whether that commerce be the trade in posters and lithographs or the outdoor advertising business itself, because such business substantially involves interstate commerce.

(C) The Sherman Act has been extended by the decisions of this Court which hold that Congressional power to protect commerce extends to cover not only interstate commerce, as such, but the intrastate activities of respondents herein which directly affect such interstate commerce.

(D) The present decision is in plain conflict with the uniform decisions of this Court and of other Circuit Courts of Appeals.

(E) The question whether respondents' restraint and obstruction of interstate commerce as alleged in the second amended complaint constitutes a violation of the Sherman Act is one of national importance to business and the public interest.

Respectfully submitted,

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No. 41

Supreme Court of the United States

OCTOBER TERM, 1940

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vs.

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

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THE ARGUS PRESS, SEATTLE

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UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

OPINIONS OF THE COURTS BELOW

The opinion of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to the second amended complaint without leave to amend, was filed April 26, 1939, and has not been officially reported (R. 54). The judgment of the said court sustaining the demurrers and dismissing the complaint without leave

to amend was signed and filed on June 8, 1939 (R. 56).

The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed February 19, 1940. It is officially reported in 109 F. (2d) 764, and appears in the record at page 81.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U.S.C.A., Sec. 347 (a)).

2. With reference to the facts set forth in the second amended complaint, this proceeding to review the decision of the Circuit Court of Appeals for the Ninth Circuit involves the validity and scope of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A., Sec. 1, *et seq.* (popularly known as the Sherman Act). The pertinent provisions of that Act are quoted at length in the footnote.[1]

---

[1] The pertinent provisions of the Sherman Anti-Trust Act involved are as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said

3. The jurisdiction of this Court is invoked because the decision of the Circuit Court of Appeals for the Ninth Circuit conflicts with the decisions of this Court and of other Circuit Courts of Appeal and the question involved is one of national importance to business and the public interest.

4. The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein sought to be reviewed is February 19, 1940. Certiorari was granted by this Court on May 6, 1940.

---

[1] Continued.

punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 1, 26 Stat. 209).

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209).

"Section 7. Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)"

STATEMENT OF THE CASE

The controlling issue involved in the present case is whether the actions of the respondents, as set forth in the second amended complaint, constitute a restraint or monopoly of commerce, and a conspiracy and attempt to monopolize commerce, in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. (*supra*, 2).

This action for treble damages under the Sherman Act was instituted February 27, 1933, in the District Court for the Western District of Washington, Northern Division. Demurrer for want of facts and lack of jurisdiction was submitted and overruled, but at the same time certain motions were granted resulting in the filing of an amended complaint. Upon answer thereto and reply, the cause stood at issue awaiting assignment for trial for an extended period during which time the Circuit Court of Appeals for the Ninth Circuit decided *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742.

Thereupon respondents moved for a reconsideration by way of motion to dismiss, which, after hearing, was granted with leave to amend, resulting in the filing of the second amended complaint on March 30, 1938. This was followed by demurrers upon the part of the respondents which were sustained without leave to amend on the authority of the *Special Site* case, and judgment of dismissal entered on June 8, 1939 (R. 56), from which appeal was taken to the Circuit Court of Appeals for the Ninth Circuit.

On February 19, 1940, the Circuit Court affirmed the judgment of the District Court in an opinion by

Judge Wilbur, who wrote the *Special Site* decision, with Judge Healy concurring in the result (R. 81). Judge Haney, who had concurred in the *Special Site* case, wrote a vigorous dissent upholding the sufficiency of the complaint and disapproving the application of the *Special Site* decision to this case (R. 97).

As the factual situation is rather involved, two diagrams are offered in the appendix (*post*, following page 62) in an effort to graphically present the relations of the parties and the way in which the conspiracy charged operated against petitioners. However, because of overlapping functions, it is impossible to illustrate all aspects of the matter and the diagrams are offered with the understanding that they do not portray all operations with exact detail.

The complaint pleads and the demurrer admits the following facts: Petitioners are owners and operators of plants used for outdoor advertising displays in Washington and Oregon (R. 3, 45, 47). Respondent, Foster & Kleiser Co., is engaged in the same business on a national scale (R. 6-8) and controls ninety per cent. of the outdoor advertising in the states comprising the Pacific Coast Area (R. 36). The remaining respondents are, Restop Realty Co., a corporation, owned and controlled by Foster & Kleiser Co., and its officers and directors, and various officers, stockholders and employees of the two corporations (R.8-10).

The outdoor advertising business, as carried on by the parties to the action, is a nation-wide business, which in several essential respects depends upon commerce between the states. The advertiser generally contracts with the lithographer (practically all of

whom are located in Kentucky, Ohio and Illinois) for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards (R. 17). These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. (R. 27). This bureau contracts with bill posting companies called "plant owners," who control sites for bill boards, for the execution of the contracts secured by the agencies (R. 28-29). Since 1927 certain bill posting companies have been organized into the Outdoor Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America (R. 21). These associations grant to their members a single "franchise" for billboard display in each community where a member plant is located, and direct all advertising which they control to such member plant. The Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs to anyone for display on independent display plant owners' billboards. Petitioners are such independents. The Association also refuses to post billboard advertising on the boards belonging to its members for advertisers who permit their advertising to be displayed on billboards belonging to such independent display plant owners (R. 21-26). Foster & Kleiser Co. controls 600 franchises and the General Outdoor Advertising Company, Inc., incorporated in 1924 in furtherance of the conspiracy, controls 1,000 franchises (R. 34). Foster and Kleiser Investment Company, a corporation, whose stock is

owned by respondents, George W. Kleiser and Walter P. Foster, purchased 50,000 shares of stock of General Outdoor Advertising Company, Inc., for $1,000,000 and George W. Kleiser became a director of the latter company (R. 32-33). The Outdoor Advertising Association of America, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. (R. 34-35). The respondent, George W. Kleiser, was a director and for many years president of the Outdoor Advertising Association of America, Inc. (R. 34). The petitioners are "independent" operators, kept from membership in and the benefits of the Outdoor Advertising Association of America, Inc., by the conspirators (R. 24).

The outdoor advertising business of the petitioners and respondents is operated on a national scale. Foster & Kleiser Co. not only posted the posters and lithographs upon its billboards after they had been delivered to a town for that purpose but, throughout the country, it directly solicited and executed contracts for such services. As part of such contracts, it procured the necessary posters and lithographs for its patrons and shipped them from one state to another. Such interstate shipment was for the primary purpose of posting them on specified billboards supplied by respondents under the terms of the contracts. The same may be said as to the designs and stencils shipped by or to respondents for use in preparing painted displays upon their boards. Foster & Kleiser Co. is a national concern engaged in a nation-wide business (R. 6-8).

Respondents intentionally entered into a nation-wide

conspiracy, the purposes of which are to monopolize the outdoor advertising business in the Pacific Coast Area; to prevent petitioners and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to petitioners and others; and to prevent petitioners and others from securing facilities to furnish an advertising service to advertisers (R. 18-19).

The general plan, scheme and conspiracy is designed and operated to effect such monopoly by:

1. Control of the business of national outdoor advertising at its source through control of the agencies and organizations placing the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the furnishing or sale of posters to advertisers for shipment in interstate commerce to or for display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained, by the petitioner companies and other competitors, by means of various unfair, predatory and illegal acts, which are referred to as local predatory acts, designed to prevent petitioners from securing posters or facilities to furnish an advertising service to national advertisers (R. 19-20).

The conspiracy disclosed is substantially identical

with that outlined in the opinion in *Ramsay Co. v. Associated Bill Posters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, which this Court held to be within the scope of the Sherman Act. The respondents admitted, in their brief below, that the complaint alleges a conspiracy within the *Ramsay* decision (R. 87). The majority opinion of the Circuit Court of Appeals apparently recognizes that the *Ramsay* decision would govern this case but for its view that the acts which injured the petitioners' business and prevented the obtaining of contracts or posters were not "done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce" (R. 92).

As a result of the respondents' control over the Outdoor Advertising Association of America, Inc. (R. 21-26) and the National Outdoor Advertising Bureau, Inc. (R. 30-31, 33-34), the conspiracy with General Outdoor Advertising Company, and the acts effectuating the conspiracy (R. 32-36, 36-42), practically all national outdoor advertising business in the Pacific Coast area was and is placed for execution upon the plants of Foster & Kleiser Co., to the exclusion of independent plants, including the petitioners' plants, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was and is thereby monopolized, restricted, curtailed and unreasonably restrained (R. 35-36).

These various acts enabled the respondents to bring about a monopoly greatly damaging petitioners' business. Petitioners are unreasonably restrained in their trade and competition with respondents in the outdoor

advertising business, all of which is injurious to petitioners and excludes them from fair competition in such trade and commerce (R. 23-26, 31, 33-34, 35-36, 41-42). Because of such inability to compete in the trade and commerce, petitioners have been damaged in that their business has been rendered unprofitable and their profits have diminished and they have suffered loss and damage thereby (R. 43-49).

Diagram No. 2, attached to this brief (*post*, appendix following page 62) graphically describes the operation of an "independent" outdoor advertising business not a party to but subject to pressure from the conspiracy. Note particularly that the efforts of the conspirators were exerted against the C. E. Stevens Company in three general ways:

A. Advertising agencies were forced to leave C. E. Stevens Company and join the National Outdoor Advertising Bureau as a result of the threats and efforts of Foster & Kleiser Co., the Bureau itself, and the Outdoor Advertising Association of America, Inc., thus diverting business from petitioners;

B. The lithographers refused to furnish their posters, lithographs, and services to C. E. Stevens Company because Foster & Kleiser Co., the Bureau and the Association threatened to boycott them if they dealt with such independent, thus restricting shipments and service to the advertising public; and

C. Local predatory acts were directed to the destruction of the C. E. Stevens Company and the other petitioners, resulting in crippling their business facilities so as to impair their ability to obtain and execute

contracts involving the interstate shipment of posters and lithographs.

SPECIFICATION OF ERRORS

I. The Circuit Court of Appeals erred in holding that since the main object of the conspiracy is to gain control of intrastate activities of the outdoor advertising business, the intent to accomplish and the actual accomplishment of that purpose by restraint upon interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs is not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d.) 742, cert. den., 299 U. S. 613, 57 S. Ct. 315, 81 L. ed. 452, is not controlling because the facts of the instant case are substantially different from those of the reported case. The Circuit Court erred in holding it is controlling.

III. The outdoor advertising business, as factually explained and set forth in the second amended complaint, substantially involves interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

IV. The Circuit Court erred in not following the decisions of this Court extending the scope of the application of the Sherman Act to cover not only

interstate commerce, as such, but intrastate activities which "directly" affect such commerce.

SUMMARY OF ARGUMENT

The Circuit Court of Appeals erred in holding that since the main object of the conspiracy was to gain control of the outdoor advertising business by monopolizing the display of posters, the intent to accomplish and the actual accomplishment of that purpose by restraint upon interstate commerce through preventing posters from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of the posters is not within the Sherman Act.

Firstly, the conspiracy set forth in the complaint was not limited to acts which might be termed intrastate in operation. The conspirators entered into a nation-wide agreement with the other two powerful combines in the business. Officers of Foster & Kleiser Co. actively participated in the management of the General Outdoor Advertising Company, in which its two stockholders had invested $1,000,000. Through this cooperation, respondents successfully intimidated advertisers and lithographers all over the country to the end that 90% of the national outdoor advertising business in the Pacific Coast Area was denied the benefits of free competition and diverted directly to them, to the serious injury of petitioners' business. This portion of the conspiracy was interstate in conception and execution.

Secondly, while the ultimate purpose of the conspirators was to benefit themselves financially by controlling the local posting of lithographs, their specific intent was to bring this about by restricting and suppressing competition throughout the country. The marketing areas were divided and advertisers and lithographers were forced to abandon petitioners and do business with respondents. In this way, respondents intended to secure all national and local business for themselves by diverting the interstate shipments of posters and lithographs from petitioners to themselves and thus forcing petitioners out of business.

The facts of the instant case differ substantially from those of *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d) 742, cert. den. 299 U. S. 613, 57 S. Ct. 315, 81 L. ed. 452. The Circuit Court erred in adopting that decision as controlling in this case.

The outdoor advertising business, as factually set forth in the complaint, substantially involves interstate commerce. A conspiracy to restrain or monopolize it and its actual restraint and monopoly, directly restrains and monopolizes interstate commerce within the prohibition of the Sherman Act.

The scope of the application of the Sherman Act has been extended by the decisions of this Court to cover not only interstate commerce, as such, but all local transactions which are inextricably mingled with and directly affect the interstate transactions. A conspiracy to restrain or monopolize such local operations, or their actual restraint or monopoly, is within the prohibition of the Sherman Act.

ARGUMENT

I. The Circuit Court of Appeals Erred in Holding That Since the Ultimate Object of the Conspiracy is to Gain Control of Intrastate Aspects of the Outdoor Advertising Business by Monopolizing the Display of Posters, the Intent to Accomplish and the Actual Accomplishment of That Purpose by Restraint Upon Interstate Commerce Through Preventing Posters and Lithographs From Other States Reaching Petitioners, or by so Crippling Petitioners' Business Facilities as to Destroy Their Ability to Obtain and Execute Contracts Involving the Interstate Shipment of Posters and Lithographs Is Not Within the Scope of the Sherman Act.

In affirming the judgment entered by the District Court the Circuit Court of Appeals stated (R. 92):

> "In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, *supra*, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting."

The quoted holding of the Circuit Court is in error for three reasons.

A. The first is that the Court failed to appreciate that the complaint charges a violation of Section 1

of the Sherman Act, by a conspiracy directly operating upon interstate shipments, as well as a violation of Section 2, by monopolization of the nation-wide business of soliciting and executing, by interstate shipment, the contracts to post such shipments. Under Section 1 the conspiracy and the resulting restraint upon interstate commerce are sufficient. The intent actuating the conspiracy is immaterial. It is only in the application of Section 2 to particular facts that the intent of the conspirators in monopolizing or attempting to monopolize the interstate commerce may be material. The rule is succinctly stated by Judge Haney in his dissenting opinion:

> "If, by necessary operation of the conspiracy, there is an actual restraint the statute is violated, the actual intent being immaterial. * * * *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; *Paramount Famous Corp. v. United States*, 282 U. S. 30, 49."
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> *C. E. Stevens Co. v. Foster & Kleiser Co.*, 109 F. (2d) 764, 772 (R. 106).

Admittedly (R. 90) the complaint pleads a violation of Section 1 by conspiracy to restrict national outdoor advertising in its broadest sense and in all of its aspects, involving generally the flow of commerce between parties residing in different states, and particularly movements of posters, lithographs, stencils and other physical paraphernalia connected therewith. It is not necessary to *stop* the interstate movement to give rise to a liability; it is sufficient that it is *diverted or restricted* to certain desired channels, which was the purpose of this conspiracy.

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368.

Judge Wilbur holds that, while the complaint does state a conspiracy to restrain interstate commerce, such restraint was not the primary object of the conspiracy. Therefore any injury to petitioners is not compensable under the Sherman Act because it results from a primary aim to monopolize the intrastate aspects of the business (R. 90). In considering this point it is important to remember that it is not essential that either the petitioners' business which is damaged or the business of the respondents constitute interstate commerce.

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
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> *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> *Schechter v. United States*, 295 U. S. 495, 544, 55 S. Ct. 837, 79 L. ed. 1570, 1587.

It is also important to remember that wherever the terms "independents", "independent plant owners", "independent plants" and "independent companies"

are found in the complaint they include and are intended to embrace the appropriate petitioner (R. 19).

Illustrating that the complaint does clearly and definitely plead the existence of the conspiracy to monopolize the business by restraint upon interstate commerce and the resultant restraint and injury to petitioners' business, we call attention to some of the allegations. Respondents, through the Outdoor Advertising Association of America, Inc. (hereinafter called the Association) and its predecessors, which they controlled by means of their agreement with General Outdoor Advertising Company (hereinafter called the General Company) (R. 32-34), intending to prevent petitioners' obtaining posters from other states, refused to post lithographs if the lithographers sold lithographs to petitioners. This refusal successfully intimidated and coerced the lithographers. As a result the free movement in interstate commerce of the posters, lithographs, printed designs, and contracts for outdoor advertising were monopolized and unreasonably restrained, and petitioners were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, and competition was lessened (R. 23, 25-26). In the same manner advertisers were forced to deal with respondents and not with petitioners (R. 23-26, 36). An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them. Every effort of the respondents through the Association (R. 21-26), the National Outdoor Advertising

Bureau (R. 26-29, 30-31, 33-36), the community of interest and actual physical and financial contact with the General Company (R. 32-36) and the so-called local predatory acts (R. 36-42) was directed toward accomplishing a monopoly of the outdoor advertising business in the Pacific Coast area by directly preventing posters and lithographs being shipped from other states to petitioners or by so crippling petitioners' business and facilities that no one would want to ship posters and lithographs to them because they would be unable to render proper and adequate service.

By burdening and restraining interstate commerce these efforts did accomplish the monopoly just as the respondents planned and they control over ninety per cent. of the business in the Pacific Coast Area. This monopoly was effected because, as planned, the interstate commerce in posters was burdened and restrained (R. 23, 26, 29, 31, 34-36, 37-44).

The conspiracy and the acts furthering it did "work to the damage of" petitioners (R. 44-48).

Judge Haney concurred in the opinion in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, which held there was no direct causal connection between the acts of the conspirators and the injury complained of. The majority treats that case as controlling here. In considering whether a direct causal connection between the acts of the conspirators and the injurious effect upon petitioners is alleged in this complaint, Judge Haney states:

> "The majority, in my opinion, has confused the 'purpose' of the conspiracy with the means

used to 'accomplish' it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial. 'It is the effect upon commerce, not the source of the injury, which is the criterion.' Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.

"The complaint contains many allegations that the accomplishment of the conspiracy 'obstructed and hindered' appellants in their business; and that 'the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.'. It was also alleged that 'in almost every case' the poster advertising contracts were 'agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state.' It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of *Santa Cruz Co. v. Labor Board*, *supra*, and *Edison Co. v. Labor Board*, 305 U. S. 197, 221, I think it inevitably follows that the effect was 'direct'." (R. 108)

B. The second reason why the quoted holding is in error is that it is based upon an incomplete analysis of the conspiracy and the means adopted to accomplish it. It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices

in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another. To control this interstate shipment they entered into a nation-wide agreement with the other two powerful combines in the business. Through purchasing stock in the General Company and electing the respondent, George W. Kleiser, to the board of that company (R. 32-33) respondents assumed a position where it was easy for them to obstruct and hinder the interstate shipment of the posters and lithographs by applying pressure on lithographers in the Middle West and on advertisers all over the country. In view of such a complex and successful plan operating throughout the United States respondents cannot maintain that their conspiracy was limited in its application to the intrastate aspects of the outdoor advertising business.

C. The third and most important error in the quoted passage is in confusing the means used by the conspirators with their ultimate ends. This is apparent from the majority's use of the word "intent" as the equivalent of the word "purpose" or "object." The ultimate "purpose" or "object" of the conspirators in all cases involving violations of the Sherman Act, is to benefit themselves materially by unreasonably limiting competition and thus acquiring the power unreasonably to fix prices, a matter which may be primarily local (R. 106). In that sense the ultimate purpose or object in the *Stevens* case is the same as it was in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368. How-

ever, an examination of the cases cited by the majority in support of its holding (R. 90-93) discloses that the intent with which the restraint upon interstate commerce is effected is not to be confused with the ultimate purpose of the conspirators.

In *Ramsay Co. v. Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. ed. 368, the conspirators were not only billposters, as in the instant case, but the association they formed to assist in the accomplishment of their conspiracy was a predecessor of the Association in this case (R. 21) and was created for like purposes. They combined and conspired to monopolize the outdoor advertising business in their respective localities and to dominate and control all trade and commerce in posters within such limits. Thus, as in the instant case, their main object or purpose was to monopolize the outdoor advertising business. They *intended* to bring this about by dominating and controlling the interstate trade in posters. Thus in the *Ramsay* case and in this, the Stevens complaint, the intent to accomplish the monopoly by restraining interstate commerce is the same. To carry out the conspiracy the Associated Billposters adopted the same restraints and burdens upon the interstate trade, as such, and upon their competitors. Plaintiffs, in the *Ramsay* case, like petitioners here (R. 4, 15-17) solicited outdoor advertising contracts and prepared, designed, purchased and displayed lithographs and posters. As a result of the conspiracy petitioners were prevented from competing in the markets, and their business was restricted and unprofitable. In discuss-

ing the case this Court said at page 511 of the decision:

> "The court below held: 'The business of the solicitors is to send their customers advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'
>
> "*We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiff, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and

plaintiff's business has suffered." (Emphasis supplied)

Ramsay Co. v. Associated Billposters, 260 U. S. 501, 511, 43 S. Ct. 167, 67 L. ed. 368, 370.

In *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916, the company had ceased to operate a closed shop and employ the union's members, all stonecutters. The union called a national strike directing all of its members to refuse to work on any job where the stone had been quarried or worked upon by non-union men. The resultant walk-offs affected building operations purely local in character. The union raised the argument that its primary purpose was to unionize the cutters and carvers at the quarry. This Court held:

"Respondents' chief contention is that 'their sole and only purpose * * * was to unionize the cutters and carvers of stone at the quarries.' And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioner's product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part

of petitioners in respect of the employment of union members in Indiana. A restraining of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47, 47 S. Ct. 522, 71 L. ed. 916, 921.

In the second *Coronado* case (*Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an *intent* to accomplish this ultimate purpose by restraining interstate commerce. By destroying the mines the production of non-union coal was to be stopped. It could not be shipped to other states "where it would by competition tend to reduce the price of coal and affect injuriously the maintenance of wages for union labor in competing mines." In discussing the question this Court said:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-trust Act.*" (Emphasis supplied)

Coronado Coal Company v. United Mine Workers of America, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. ed. 963, 970.

The majority opinion in the Circuit Court of Appeals also calls attention to *Local 167, I. B. T., etc., v. United States*, 291 U. S. 293, 54 St. Ct. 396, 78 L. ed. 804. Marketmen, who acted as wholesalers of the continuous stream of live poultry pouring into New York, purchased the poultry and sold it to retailers after interstate transit had ceased. They organized a Chamber of Commerce with the ultimate purpose of monopolizing the business and increasing prices. They engaged in many acts to control the handling, the sales and the price of the poultry. They denied that they intended to restrain or did interfere with interstate commerce. In approving the granting of the injunction this Court held:

> "Appellants' contention that there is no proof that they intended to restrain or did interfere with interstate commerce has no merit.
>
> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. * * * But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * * The

Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions. * * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."

Local 167, I. B. T., etc., v. United States, 291 U. S. 293, 297, 78 L. ed. 804, 808, 54 S. Ct. 396.

The recent decision of this Court in *Apex Hosiery Company v. Leader*, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913, in its discussion of the background, theory and purpose of the Sherman Act, contains a great deal that is very significant and appropriate upon consideration of the facts and issues of this case.

"In 1890 when the Sherman Act was adopted there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation. With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes making conspiracies to interfere or actual interference with interstate commerce by violence or threats of violence felonies. It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of business and of capital organized and directed to control of the market by suppression of competition in the marketing of goods

and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

"For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition *that Congress exercised 'all the power it possessed.'* " (Emphasis supplied)

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 990, 84 L. ed. 913.

"In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concen-

> trated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints."
>
> *Apex Hosiery Company v. Leader*, ... U. S. ....., 84 L. ed. 913, 60 S. Ct. 982, 994.

In discussing the oft-repeated defense that a conspiracy is not within the scope of the Sherman Act because its effect upon interstate commerce is indirect, it was said:

> "It was thus made apparent that in saying that 'indirect obstructions' to commerce were not condemned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.' *And in*

speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is 'indirect' it meant no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy." (Emphasis supplied)

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 1001, 84 L. ed. 913.

In applying these principles to the instant case, it is well to keep in mind that we are dealing with a demurrer treated as a motion to strike. Almost without exception the cases discussed in the *Apex* decision were before the Court, as was the *Apex* case, after trial. The record of the evidence in those cases showed the exact nature and extent of each restraint and the intent with which it was effected. Here we must accept the allegations of the complaint in place of the abstract of the evidence at the trial.

Conceding, for the purpose of argument, that there is no specific direct interference with interstate commerce pleaded in this case, against what was the conspiracy described in the complaint directed? Both petitioners (R. 4-6) and respondents (R. 6-12) were and are engaged in a business national in scope, involving interstate solicitation, entering into and execution of poster and painted bulletin and wall display contracts. The contracts contemplate and the parties to this suit actuate the shipment of posters, lithographs, designs and stencils from third persons in other states to their "plants" in the Pacific Coast Area in fulfillment of the contracts (R. 4-12). Peti-

tioners and respondents, therefore, were engaged in such interstate business and commercial transactions. Can it be doubted that this was a conspiracy to restrain free competition in such interstate market, tending "to monopolize the supply, control its price or discriminate between its would-be purchasers," squarely within the Sherman Act and violative of its provisions?

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913.

Foster & Kleiser Co. and the remaining respondents admittedly entered into a conspiracy (R. 18, 87). The purpose of that conspiracy is plainly set forth in these words:

"VIII.

"The purpose and object of said plan, scheme and conspiracy was to attempt to monopolize and by various acts and means taken individually, in concert with the organizations and by and through the means and methods hereafter set forth, to monopolize in the Pacific Coast Area all branches of the outdoor advertising business, which business has hereinabove been described, and particularly to prevent plaintiff and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or (15) local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities

whereby said independent plant owners could furnish a satisfactory advertising service to advertisers. Wherever used in this complaint, the terms 'independents,' 'independent plant owners,' 'independent plants' and 'independent companies' include and are intended to embrace the appropriate plaintiff company.

"The general plan, scheme and conspiracy was to effect such monopoly by:

"1. Monopoly of the business of national outdoor advertising at its source through control of the agencies and organizations selling the same.

"2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

"3. Prevention of and restraint upon the sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

"4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained by the plaintiff company and other competitors, by means of various unfair, predatory and illegal acts more fully set forth hereinafter in paragraph XV." (R. 19)

"IX.

"The defendant, Foster & Kleiser Co., at all times from and after its organization, has been continuously and now is furthering and carrying out said plan, scheme and conspiracy.

"All the acts, occurrences and facts hereinafter set forth were done and performed by said defendant, Foster & Kleiser Co., and Restop Realty Co., and their agents and employees, for

the purpose of furthering, carrying out and completing said plan, scheme and conspiracy." (R. 20)

We have previously reviewed at some length the methods employed by the conspirators to accomplish their purpose and the manner in which they did accomplish it (*supra*, 5-11).

This is a sufficient statement of claim under the Federal Rules of Civil Procedure.[1]

An allegation of the purpose or intent with which an act or series of acts is done is an allegation of fact good upon demurrer. 49 C. J. p. 57, §51. Intent may be averred generally. Federal Rules of Civil Procedure, Rule 9 (b).

This analysis of the case cited in the majority opinion as authority for the quoted passage (*supra*, 14) indicates that in each case, as here, while the *ultimate purpose or object* was to monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And,

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[1] "RULE 8. GENERAL RULES OF PLEADING.

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain. . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

"(e) Pleading to Be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required."

Federal Rules of Civil Procedure, Rule 8 (a) and (e) (1).

in each case, the presence of this intent was the element which brought the case within the scope of the Sherman Act. The majority has failed to distinguish between ultimate purpose and the intent to accomplish such purpose by a restraint upon interstate commerce forbidden by the Sherman Act.

The conclusion that the instant conspiracy and the acts effectuating it violated the provisions of the Sherman Act is further strengthened by the fact that not only was the conspiracy "aimed or directed at the kind of restraint which the Act prohibits" but such restraint was the natural and probable consequence of the conspiracy.

The pressure brought to bear by the conspirators upon lithographers in the Middle West naturally resulted in their refusing to sell or ship posters or lithographs for posting on the petitioners' boards. To have done so would have lost the lithographers the greater volume of business they did with the conspirators. The same can be said of the threats made to the advertisers. If they were willing to lose valuable mediums of presenting their products to the public, they could continue to advertise on petitioners' boards. But obviously they could not afford to do so.

The natural consequence of the "local predatory acts" was to destroy the petitioners' efficiency as going concerns and lead national advertisers away from them. An advertiser, already threatened by the conspirators, would be quick to see that if he shipped his posters to petitioners for display on their boards the posters might never be displayed because of the effectiveness of the conspirators' illegal campaign against

those very boards. Furthermore, such action on his part would lose him the opportunity to advertise further through respondents' plants. Naturally he would be forced to ship them to the conspirators or dismiss the idea of an advertising campaign.

Similarly, the Association and the Bureau produced, as a natural consequence of their activities, a tightening of the conspirators' grip upon the entire national outdoor advertising business and the direction of the interstate flow of posters, lithographs, designs and stencils in that business. If they were not formed for that purpose, for what were they created? Why were their actions, dictated by the conspirators, constantly directed against the petitioners and other independents? Why the contracts between them and between General Outdoor Advertising Company and Foster & Kleiser Co.? How does it happen that a dummy corporation "invests" a million dollars in the General Outdoor Advertising Company and George W. Kleiser is elected to the latter's board?

Even though it be said that the conspirators were actuated by a desire to promote the interests of the national outdoor advertising business or rescue it from a distressful condition, they are still liable where they have combined to produce restraint upon interstate commerce. *United States v. Socony-Vacuum Oil Co.* ..... U. S. ....., 60 S. Ct. 811, 84 L. ed. 760.

It directly and specifically appears that these efforts accomplished the purpose of the conspirators. The national outdoor advertising business was monopolized. Posters, lithographs, designs and stencils traveled from one state to another, their destinations

dictated and controlled by the conspirators (R. 23, 26, 29, 31, 34-44).

The conspiracy and the acts furthering it damaged petitioners' business (R. 44-48).

It is plain that the conspiracy was intended to limit or destroy free competition in the national outdoor advertising business itself and in the interstate trade and commerce in posters, lithographs, designs and stencils. Its purpose and effect was to monopolize the business of outdoor advertising, to discriminate against independent plants and those desiring to use their services, and to control prices and deprive consumers of the advantages which they derive from free competition. The application of the doctrine of the *Apex* case shows clearly that there has been a violation of the Sherman Act.

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913;

Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963 (Second Coronado case);

Bedford Cut Stone Company v. Journeymen Stone Cutters' Association, 274 U. S. 37, 47 S. Ct. 522, 71 L. ed. 916;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. ed. 349;

Lowe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301, 52 L. ed. 488.

Therefore, it is respectfully submitted that the Circuit Court of Appeals erred in holding that because the ultimate purpose of the conspiracy was to gain control of the intrastate aspects of the outdoor ad-

vertising business by restraining and monopolizing the display of posters, the intent to accomplish and the actual accomplishment of that purpose by means of restraint upon and monopoly of interstate commerce through preventing posters and lithographs from other states reaching petitioners or by so crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of posters and lithographs are not within the scope of the Sherman Act.

II. *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9) 85 F. (2d) 742, Is Not Controlling Because the Facts of the Instant Case Are Substantially Different From Those of the Reported Case.

This Court has held that in the determination of whether or not a particular case falls within the purview of the Sherman Act, each case must be considered on its own facts.

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts."
>
> *Sugar Institute v. United States*, 297 U. S. 563, 600, 56 S. Ct. 629, 80 L. ed. 859, 876.

The essence of the *Special Site* decision seems to be this: Bill posting, as *alleged in the complaint*, is local in character. Shipments made by the defendant from itself in one state to itself in another state of materials used in bill posting cannot be the subject

of a conspiracy to restrict interstate commerce. The defendant could not conspire with itself. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). There were no allegations that the defendant had anything whatever to do with the shipment of posters or their movement in interstate commerce. The transportation of the necessary posters and lithographs in interstate commerce was not alleged to be related to or involved in any way in the defendant's bill posting business. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 745). The parties and activities in that case were substantially confined to the State of California. The theory of the *Special Site* complaint was that if the parties locally displayed posters or lithographs which had been the subject of interstate transportation and the defendant committed local acts of depredation tending to interfere with plaintiff's local display, such acts and interferences, through the resulting effect upon a subject of interstate commerce, constituted a violation of the Sherman Act. (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750). In holding that this theory was erroneous, the court pointed out that the interference with interstate commerce, which is subject to the act, must be direct and not merely an indirect resulting effect. The court was of the opinion that since there were no allegations that defendant had conspired with another to directly restrain transportation between one state and another, or was monopolizing the business so as to produce that direct effect, the local acts of depredation complained of were not violative of the Sherman Act, and that interstate commerce was not involved simply because

posters or other materials were shipped between states by parties with whom the defendant had no relation.

> "In the absence of an allegation of the causal connection between the damage, and the conspiracy to restrict interstate commerce in posters, no cause of action is stated under the Sherman Anti-Trust Act."
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 754.

In that case the means alleged to have been used to restrain interstate commerce, consisting primarily of local acts of a competitive nature between parties who were residents of the same state, were, the Court said, "adopted to the injury or destruction of the plaintiffs' business in its intrastate aspects," and none of them "are *alleged* to have directly affected the interstate trade in posters or lithographs" (Emphasis supplied).

The situation thus disclosed by the *Special Site* decision falls far short of the nation-wide conspiracy factually alleged in the *Stevens* complaint. Respondents are engaged in business on a national scale (R. 6-8) actively preparing, designing, purchasing and displaying posters and lithographs (R. 15-17). They enter into thousands of contracts actuating the interstate shipment of the posters and lithographs for display upon billboards controlled by them in several states, and in many cases for display upon designated boards (R. 11-12). Respondents entered into and are carrying out a conspiracy to monopolize the outdoor advertising business and this monopoly is intended to be effected by restraint upon the interstate

commerce in posters and lithographs in two respects. The first is to restrain such commerce by utilizing the Association, the Bureau, and the "tie-ups" with the General Company to force lithographers and advertisers to cease sending posters and lithographs to petitioners in the states in which they do business and to send those posters and lithographs to respondents (R. 20-26, 29, 32-36). The second is to institute a series of so-called local predatory acts which will so cripple petitioners' business facilities as to destroy their ability to procure and execute contracts involving interstate shipment of the posters and lithographs so that advertisers will deal only with respondents (R. 18-20, 36-42). These efforts to accomplish the monopoly by restraining interstate commerce are entirely successful as planned by the conspirators. They now control over 90% of the outdoor advertising business in the Pacific Coast Area and have successfully damaged and crippled petitioners' business (R. 23, 26, 29, 31, 34-44).

It is, therefore, respectfully submitted that the Circuit Court erred in holding that *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, in any sense controls the instant case.

The action of this Court in denying certiorari in *Special Site Sign Company v. Foster & Kleiser Company*, 299 U. S. 613, 81 L. ed. 452, 57 S. Ct. 315, should not be regarded as significant both because of the oft-repeated admonitions of this Court to this effect and also because the order of the Circuit Court of Appeals in that case was not a final one but re-

manded the case with leave to amend and for further proceedings.

III. The Outdoor Advertising Business, as Factually Explained and Set Forth in the Second Amended Complaint, Substantially Involves Interstate Commerce, and a Conspiracy to Restrain or Monopolize It Directly Restrains and Monopolizes Interstate Commerce and is Within the Scope of the Sherman Act.

In a footnote to the opinion (R. 86) the court says:

> "Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. *Ware and Leland v. Mobile County*, 209 U. S. 405; *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436; *Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91." (*Pacific Railways Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916).

Strictly speaking petitioners admit that this statement is true so far as it goes. However the cases cited are inapplicable to the situation now before this Court. In none of those cases did the court decide that a nation-wide business of preparing, designing, purchasing and displaying posters and lithographs in the course of which thousands of contracts arose *actuating* the interstate shipment of these posters and lithographs for display on specified billboards was an *intrastate* business not substantially involving interstate commerce. The only cited case which concerned the application of the Sherman Act is *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S.

436, 40 S. Ct. 385, 64 L. ed. 649. Only Section 2 of the Act was involved (See *supra*, 14, for distinction between Sections 1 and 2). In that case this Court held that the advertising contracts which the plaintiff advertising agent offered the defendant publisher and which the latter refused to accept had no direct relation to the circulation of the magazines in interstate commerce. That ruling is inapplicable here for the reasons previously stated (*supra*, 20-36).

Further, the *Special Site* case rests its ruling that the billposting business is not interstate in character upon this Court's ruling in *Packer Corp. v. State of Utah*, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643. The latter case involved a state statute prohibiting the posting of tobacco advertising in Utah. It was aimed at the use of the poster *after* it was affixed to the billboard. No facts appeared in that case to support a finding that the defendant was engaged in a business substantially involving interstate commerce, or that its nation-wide illegal combinations had made it substantially interstate in character. These allegations are present in the Stevens complaint. Consequently, the *Packer* decision is inapplicable to this case. It does not generally and finally determine that every outdoor advertising business is stricty intrastate in character.

Contrary to the theory of the *Special Site* complaint and the trial court's instructions therein held to be erroneous (*Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 750) the petitioners herein are not attempting to tie the businesses of petitioners and respondents to interstate commerce through the inter-

state transportation of bills and display advertising matter *by other parties who were direct shippers.*

After discussing the Special Site Sign Company's theory that the outdoor advertising business is, *per se*, interstate commerce, as disclosed by allegations that various materials, used in the business, are transported across state lines, that the business is conducted in several states, and that the products advertised are transported in interstate commerce, the Court concludes in the following words:

> "It follows that the allegations of the complaint that the outdoor advertising business is interstate commerce must be disregarded as a mere conclusion of the pleader, *unsupported by the specific allegations as to the nature of the business*, which is intrastate in character. Therefore, as the outdoor advertising business is not interstate commerce, but is local in character, the theory of the pleader must fail to that extent." (Emphasis supplied)
>
> *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742 at 753.

The distinction between that case and this one is that here the complaint does not allege *as a mere conclusion* that the outdoor advertising business is interstate commerce, unsupported by specific allegations as to the nature of the business. The C. E. Stevens complaint *specifically and factually establishes that the business of national outdoor advertising as involved herein, is so conducted on a national scale as to be interstate commerce.* That allegation is in the following words:

"That plaintiff company has at all times men-

tioned herein engaged in the outdoor advertising business, that is to say, *has been engaged in the solicitation of, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States.* That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the designs or stencils upon bill boards or paint panels supplied by the plaintiff company. That it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboards or paint panels and, in many cases, that they be placed or painted upon certain specified bill boards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. *That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States to another state solely to be placed upon a stated number and class of bill boards and, in many cases, to be placed upon certain specified bill boards, which are the property or within the control of the plaintiff company, and are at all times within the contemplation of the parties to the said contracts.* That in execution of the said contracts the said designs, sten-

ills and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of bill boards or paint panels and, in many cases, upon certain specified bill boards or paint panels, which are the property of or within the control of the plaintiff company, and are at all times within the contemplation of all the parties to the said contracts. *That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from the said designs or stencils are placed or painted upon the pre-determined and stated number and class of bill boards or paint panels, as aforesaid, the primary consideration for each entire contract has not been performed and each said contract remains executory and incomplete.* That by thus engaging in the outdoor advertising business the said plaintiff company has been and is engaged in interstate commerce between the several states of the United States." (Emphasis Supplied) (R. 4-6)

Solicitation of outdoor advertising contracts as involved herein, is defined in the complaint in the following words:

"The solicitation of outdoor advertising contracts involves:

"(a) The preparation and submission to advertisers of advertising copy or designs by reproduction, either in print or in paint on signboards, walls, or panels, constructed for that purpose.

"(b) The procurement from lithographers, and

the submission to advertisers, of estimates covering the cost of printing posters;

"(c) The procurement primarily through the association or associations hereafter mentioned, from poster plant and paint plant operators of statistical information concerning the location of poster plants and paint plants in the various towns and cities throughout the United States, as well as the charges for displays thereon, and the submission to prospective advertisers of estimates of the cost of displaying advertising matter on such plants;

"(d) Entering into the contracts, either as principal or as agent for the advertiser, for the purchase of advertising posters pursuant to copy or designs approved by the advertiser, and the subsequent transportation and delivery of the same in interstate commerce from the lithographer to the operators of poster plants located in cities, towns and villages throughout the United States consigned to a stated number and class of billboards and/or paint panels, and, in many cases, to certain specified billboards and/or paint panels for posting in accordance with the instructions of the advertiser;

"(e) Entering into a contract, either as principal or as agent for the advertiser, with operators of poster plants and paint plants, for the display of poster and painted advertising matter which is to be transported in interstate commerce in accordance with the advertiser's instructions;

"(f) Causing the approved copy or designs for painted signs to be transported in interstate commerce from the office or studio of the advertiser or his agent, to operators of paint plants

in the various cities and towns throughout the United States consigned for reproduction on a stated number and class of paint panels, and, in most cases, on certain specified paint panels, in accordance with the advertiser's directions;

"(g) Checking and inspecting the displays of advertising matter on the poster and paint plants which have been selected by the advertiser or by the solicitor on its behalf;

"(h) Making payments to the operators of the poster plants and the paint plants for the use of their plants; and

"(i) Collecting from the advertisers for services rendered." (R. 15-17)

Since these allegations apply to the respondent with equal force (R. 6-8) insofar as national outdoor advertising is concerned, the respondent, Foster & Kleiser Co., actuates the shipment of posters, lithographs, etc., from one state to another and such shipment is a more important element of the business than the mere pasting the poster to the billboard. Further, the contract of outdoor advertising participated in by the respondent, Foster & Kleiser Co., provides for one continuous act from the time the poster leaves the manufacturer until it is actually pasted upon the billboard. These allegations state facts, which were not presented in the *Special Site* complaint, supporting the petitioners' conclusion that the outdoor advertising business was and is interstate in character. Their presence in *Ramsay Co. v. Associated Billposters*, 260 U. S. 501; 43 S. Ct. 167; 67 L. ed. 368, resulted in a decision favorable to the plaintiffs. It is just as specifically alleged that they were solicitors of national advertising. Since

these allegations appear in this complaint, they furnish ample factual support for the petitioners' contention that any conspiracy to restrain or monopolize the outdoor advertising business as involved herein in its *interstate aspect* violates the Sherman Anti-Trust Act. And this is so without regard to whether the business also has its *intrastate aspects*.

> "The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."
>
> *United States v. Brims*, 272 U. S. 549; 47 S. Ct. 169; 71 L. ed. 403.

The Supreme Court has held the business of publishing and circulating farm papers to be interstate commerce.

> "The business that is here alleged to have been *damaged* is the publication and circulation of these farm papers. *That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements* and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, 64 L. ed. 649, 40 S. Ct. 385, *supra*, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Emphasis Supplied)

Indiana Farmer's Guide Pub. Co. v. Prairie F. P. Co., 293 U. S. 268, 276; 55 S. Ct. 182; 79 L. ed. 356, 360.

Essential elements of the Prairie Farmer case were the obtaining of advertising and the transporting between states of electrotypes sent respectively to plaintiff and defendant by their customers to be used in setting up advertisements. The case is distinguished from *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, 40 S. Ct. 385, 64 L. ed. 649, in that the advertising contracts in the *Blumenstock* case involved no movement of goods or merchandise in interstate commerce or any transmission of any intelligence in such commerce.

The General Company, the Bureau, the Association, Foster and Kleiser Company (Foster & Kleiser Co.), Foster and Kleiser Investment Company, George W. Kleiser and others were defendants in a suit for an injunction under the Sherman Act, brought by the United States in the District Court for the Southern District of New York (*United States v. General Outdoor Advertising Co., Inc., et al.*, in the District Court of the United States, for the Southern District of New York, in Equity, No. 46-50; unreported). In the main the petition set forth the particulars of the conspiracy alleged in the instant case. After some evidence had been introduced a consent decree was entered on May 7, 1929. While the petition was dismissed, without prejudice, as to the Association, Foster and Kleiser Company and Foster and Kleiser Investment Company, the conspiracy was held to be within the scope of the Sherman Act and the conspirators were perpet-

ually enjoined from entering into or performing any agreement, *the intent of or effect of which would be to restrain or monopolize the business of soliciting contracts for outdoor advertising displays, or the execution of such contracts.* The conspirators were enjoined from continuing the so-called "local predatory acts" and George W. Kleiser, respondent herein, was forced to resign from the board of the General Company.

The following year a similar petition was filed in the Southern District of California against Foster & Kleiser Company, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., and Restop Realty Company (*United States v. Foster & Kleiser Company, et al.*, in the District Court of the United States, for the Southern District of California, Central Division, In Equity, No. R-31-M). The very conspiracy about which the petitioners herein complain, was detailed at length in that suit. On March 13, 1931, the court signed a consent decree. The conspiracy was again held to be within the scope of the Sherman Act and the monopoly of and the attempt to monopolize interstate trade and commerce in outdoor advertising was held to be violative of the Act. The conspirators were enjoined from continuing their efforts to monopolize the interstate trade and commerce in outdoor advertising. The decree detailed the "local predatory acts" as important parts of the conspiracy and they were specifically enjoined.

Thus on two different occasions the courts have ruled *that these very conspirators' business of soliciting and executing contracts for outdoor advertising*

displays was interstate commerce and the conspiracy to restrain or monopolize it and its restraint or monopoly was violative of the provisions of the Sherman Act.

Furthermore, it is petitioners' contention that the fact that the outdoor advertising business is considered as intrastate is immaterial in this case. Where the operation of an intrastate business is a part of a conspiracy to restrain and monopolize the outdoor advertising business throughout the country, such operation is itself in restraint of interstate commerce within the scope of the Sherman Act. This point is well discussed in *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. ed. 975.

> "In *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141, running a corner in cotton in New York City by which the defendants were conspiring to obtain control of the available supply and to enhance the price to all buyers in every market of the country was held to be a conspiracy to restrain interstate trade because cotton was the subject of interstate trade, and such control would directly and materially impede and burden the due course of trade among the states, and inflict upon the public the injuries which the Anti-trust Act was designed to prevent. Although running the corner was not interstate commerce, the necessary effect of the control of the available supply would be to obstruct and restrain interstate commerce, and so the conspirators were charged with the intent to restrain. The difference between the *Patten* case

and that of *Ware & Leland v. Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, illustrates a distinction to be drawn in cases which do not involve interstate commerce intrinsically, but which may or may not be regarded as affecting interstate commerce so directly as to be within the Federal regulatory power. In the *Ware & Leland* case, the question was whether a state could tax the business of a broker dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another. The tax was sustained and dealing in cotton futures was held not to be interstate commerce, and yet thereafter such dealings in cotton futures as were alleged in the *Patten* case, where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of interstate commerce. And so, in the case at bar,—coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred."

United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344, 410, 42 S. Ct. 570, 66 L. ed. 975, 995.

Thus, in the first *Coronado* case, coal mining was held to be intrastate and a strike directed against production at the mine to protect the wage scale of union miners was not within the scope of the Sherman Act.

However, in the second *Coronado* case (*Coronado*

Coal Company v. United Mine Workers of America, 268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963) the evidence indicated that, while the strike was directed against production at the mine to protect the wage scale of union miners, there was also an intent to accomplish this ultimate purpose by restraining interstate commerce. This Court concluded that the conspiracy violated the Sherman Act even though coal mining, as such, was intrastate. In discussing the question, this Court said:

> "The mere reduction in the supply to an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. *But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering or moving in interstate commerce, or the price of it in interstate markets, their action is in direct violation of the Anti-trust Act.*" (Emphasis supplied)
>
> *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. ed. 963, 970.

IV. The Instant Case is Within the Sherman Act Since the Scope of That Act Has Been Extended by the Several Decisions of This Court Which Hold That Congressional Power Over Commerce Extends to Cover Not Only Interstate Commerce, as Such, But Intrastate Activities Which "Directly" Affect Such Commerce.

The congressional power over commerce is governed by the Constitution, Art. I, Sec. 8.[1] Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U.S.C.A. §151 *et seq.*), the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U.S.C.A. §601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U.S.C.A. §511 to 511q). The scope of each of these acts has been passed upon by this Court.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668, 83 L. ed. 1014;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

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[1] "Section 8. The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . ." Constitution of the United States, Art. I, §8; U.S.C.A., Part 1, p. 32.

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

This Court in the first cited case announced what has come to be known as the expanded concept of interstate commerce in the following words:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Second Employers' Liability Cases, 223 U. S. 51, 56 L. ed. 345, 32 S. Ct. 169.
>
> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 37, 57 S. Ct. 615, 81 L. ed. 893, 911.

* * * * * * *

"It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved." 301 U. S. 40, 81 L. ed. 913.

* * * * * * *

"* * * In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because they may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. *When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?* We have often said that interstate commerce itself is a practical conception. It is equally true that inter-

ferences with that commerce must be appraised by a judgment that does not ignore actual experience." (Emphasis supplied) 301 U. S. 41, 81 L. ed. 914.

Where local transactions are so inextricably mingled with and directly affect the admitted interstate transactions they, too, are subject to Federal authority. The local transactions are caught up in the current of interstate commerce or their manipulation is capable of directly affecting, burdening and obstructing the interstate commerce and thus they become subject to Federal regulations. This view is further expressed in the following cases:

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, 308 U. S. 584, 60 S. Ct. 107, 84 L. ed. 86;

Edwards v. United States, 91 F. (2d) 767;

United States v. Wilshire, 9 F. Supp. 936, aff. 77 F. (2d) 1022;

Can it be said that a strike in the Jones & Laughlin Steel Corporation plant would be any more catastrophic in its effect upon the industrial and business life of the nation than results from these conspirators fastening their grip upon all outdoor advertising in the Pacific Coast Area? All industry and business, great and small, interstate or intrastate, must conform to the conspirators' regulations and policies and pay the prices they ask or see a vast market closed to

their goods. In accordance with the conspirators' dictates, advertisers dare not deal with petitioners or other independents. Petitioners' business disappears. And it is this control the conspirators refer to as purely intrastate.

This Court has indicated in *Interstate Circuit, Inc., et al., v. United States*, 306 U. S. 208, 59 S. Ct. 467, 83 L. ed. 610, that, in circumstances strikingly similar to those in the instant case, the theory of the expanded application of Congressional power over commerce applies in cases involving violations of the Sherman Act.

Under the foregoing decisions of this Court, even if respondents' business and the acts they engaged in to further their conspiracy are intrastate in character, their activities did have a direct effect upon the interstate trade in posters and lithographs. In view of this direct restraint upon that commerce, their illegal intent (which has never been denied by respondents) will be presumed. The injury they have caused petitioners' business is thus compensable under the Sherman Act.

As in *Apex Hosiery Co. v. Leader*, 108 F. (2d) 71, the Circuit Court in the instant case failed to follow the express ruling of this Court in the foregoing cases on the ground that the term "affecting commerce" has a broader connotation than the term "in restraint of trade or commerce among the several states." Its view was:

> "* * * The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of

> Congress to exercise control over activities which separately considered are intrastate but which, because of their close and substantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law. As we have stated, the Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the *primary* purpose of monopolizing or restraining commerce among the several states, are not covered by such laws although such activities might incidentally affect interstate commerce." (R. 94) (Emphasis supplied)

Such a holding ignores, firstly, the fact that all the legislation under discussion is based upon the same constitutional provision and each act seeks to protect the same kind of commerce. There should be no differentiation between the degrees of the commerce that each protects. Secondly, it ignores the definition of the term "affecting commerce" as including "burdening or obstructing commerce," which has always been considered by this Court as synonymous with "restraining commerce." Finally, it ignores

the above-cited decisions of this Court that, irrespective of the terms used in the particular statutes, the intrastate acts complained of had a direct effect upon interstate commerce, even though those acts, separately considered, were local in character.

The Circuit Court proceeded on the theory that in passing the Sherman Act, Congress had exercised less than all its power over interstate commerce under the Commerce clause. But in considering the scope of the Sherman Act in *Apex Hosiery Company v. Leader*, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913, this Court again stated that in the sense of preventing restraints on commercial competition, Congress exercised "all the power it possessed," citing *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, 52 S. Ct. 607, 76 L. ed. 1204. As has been previously said (*supra*, 53-59) the power Congress possesses to regulate interstate commerce and all intrastate activities affecting it is ably and fully indicated in the recent cases before this Court.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893;

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197; 59 S. Ct. 206, 83 L. ed. 126;

National Labor Relations Board v. Crowe Coal Company, 104 F. (2d) 633, cert. den. *Crowe Coal Co. v. National Labor Relations Board*, 308 U. S. 584; 60 S. Ct. 107, 84 L. ed. 86;

Mulford v. Smith, 307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092;

Santa Cruz Fruit Pack. Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656, 82 L. ed. 954;

United States v. Rock Royal Co-Operative, 307 U. S. 533, 59 S. Ct. 993, 83 L. ed. 1446;

Currin v. Wallace, 306 U. S. 1, 59 S. Ct. 379, 83 L. ed. 441.

It is apparent, from what is said in both the majority and the minority opinions in the *Apex* case, that the meaning and extent of "interstate commerce" under the Sherman Act is not more restricted than under the Wagner Act and other similar statutes, and that the application of the Act in that case was defined, not because of lack of effect upon interstate commerce, but solely because the acts complained of were not "the kind of restraint of trade or commerce at which the Act is aimed."

The following quotation from the dissenting opinion in the *Apex* case indicates that the Court as a whole applied the expanded theory of the scope of Congressional power over interstate commerce and intrastate activities affecting it to the Sherman Act cases as well as to those arising under the National Labor Relations Act.

> "The attempt in the court below to distinguish between the use of the word 'affect' in the National Labor Relations Act and the word 'restraint' in the Sherman Act is ineffectual as it fails to take note of the fact that the word 'affect' was construed as purporting 'to reach only what may be deemed to burden or obstruct' interstate or foreign commerce and hence under the

familiar principle 'that acts which directly burden or obstruct interstate or foreign commerce or its free flow, are within the reach of the congressional power,' the statute was upheld. *National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra*, pp. 31, 32."

Apex Hosiery Company v. Leader, ... U. S. ....., 60 S. Ct. 982, 84 L. ed. 913.

It is therefore respectfully submitted that the Circuit Court erred in not holding that the application of Congressional power over commerce, insofar as the Sherman Act is concerned, has been extended by the recent decisions of this Court to cover not only interstate commerce, as such, but the intrastate activities of these respondents which directly affect such commerce.

CONCLUSION

This brief is submitted by and on behalf of all three petitioner corporations who join in it for the convenience of the Court and the parties without implying joint claims or interests.

In conclusion it is respectfully submitted that the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court sustaining respondents' demurrer and dismissing the complaint, be reversed for the following reasons:

(A) The primary intent of respondents was to accomplish their monopoly by restraining and obstructing the interstate commerce in posters and lithographs.

(B) As a result of respondents' conspiracy and acts

in furtherance thereof, there was a direct restraint upon and monopolization of interstate commerce, whether that commerce be the trade in posters and lithographs or the outdoor advertising business itself, because such business substantially involves interstate commerce.

(C) The scope of the application of the Sherman Act has been extended by the decisions of this Court which hold that Congressional power to protect commerce extends to cover not only interstate commerce, as such, but the intrastate activities of respondents herein which directly affect such interstate commerce.

Dated at Seattle, Washington, October 7, 1940.

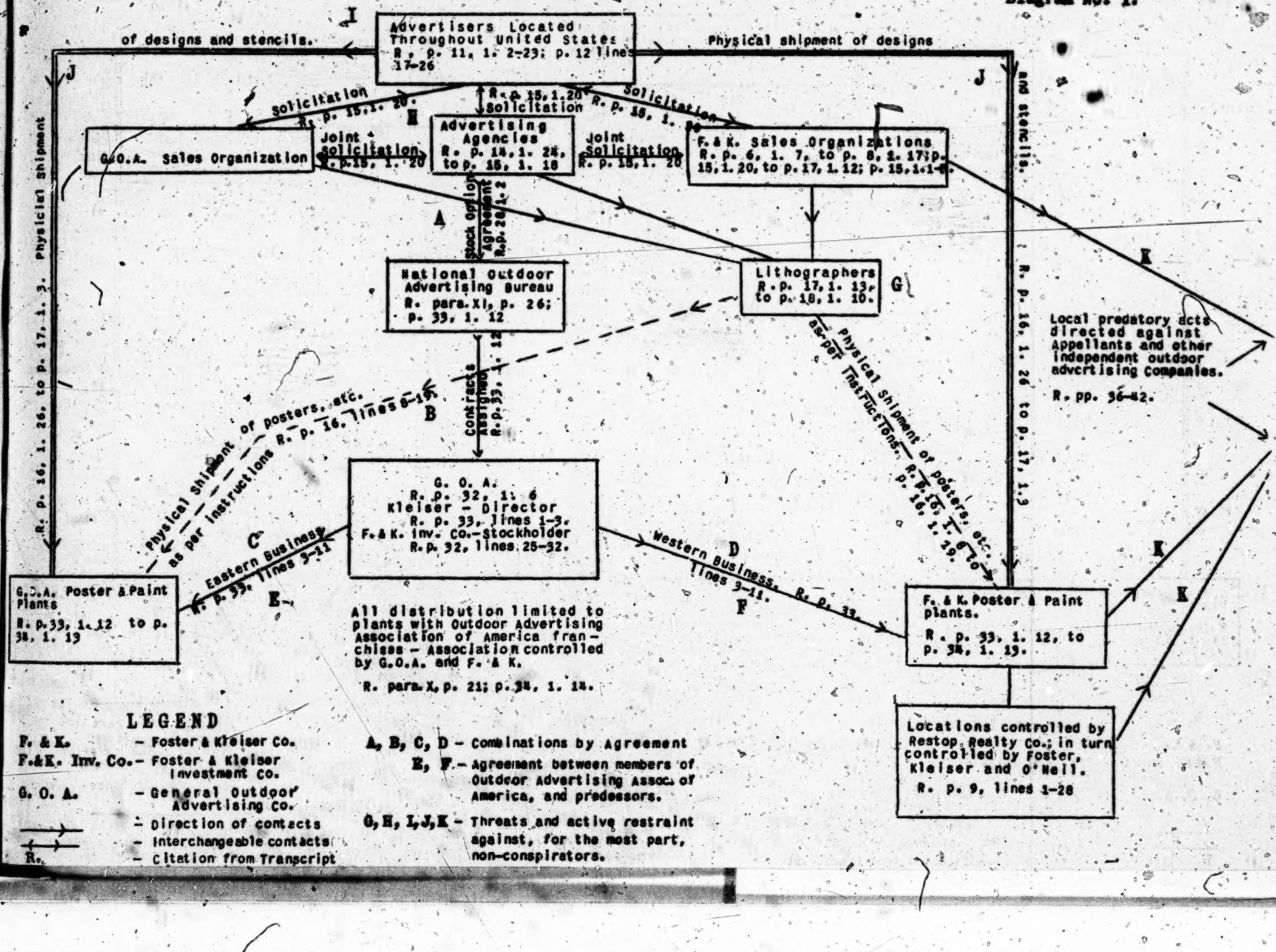
Respectfully submitted,

H. B. JONES,
WHEELER GREY,
Attorneys for Petitioners.

APPENDIX

THE COMBINATION AFTER 1924

Diagram No. 1.



LEGEND

F. & K. – Foster & Kleiser Co.

F.&K. Inv. Co. – Foster & Kleiser Investment Co.

G. O. A. – General Outdoor Advertising Co.

→ – Direction of contacts

↔ – Interchangeable contacts

R. – Citation from Transcript

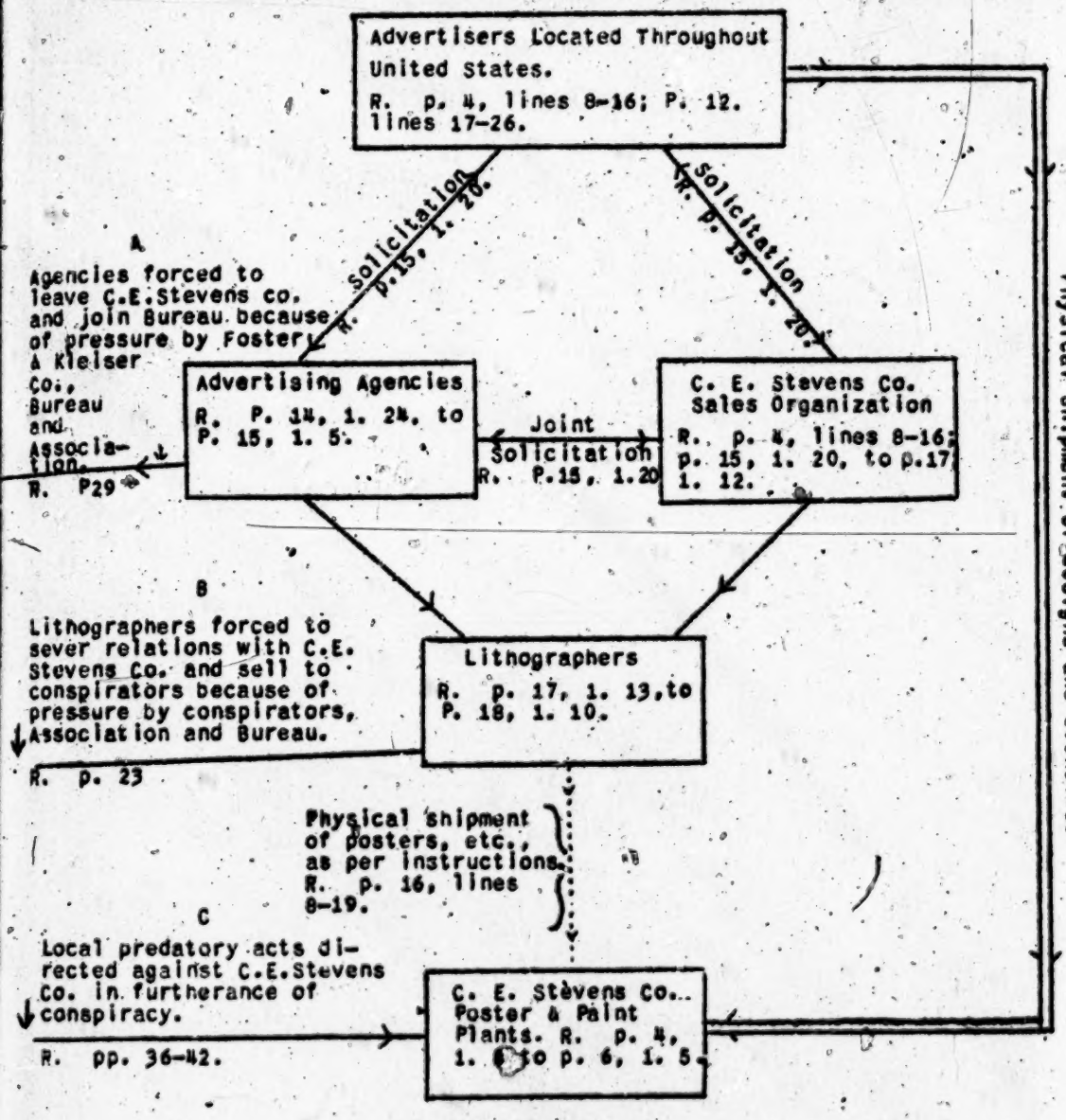
A, B, C, D – Combinations by Agreement

E, F – Agreement between members of Outdoor Advertising Assoc. of America, and predessors.

G, H, I, J, K – Threats and active restraint against, for the most part, non-conspirators.

Diagram No. 2

AN "INDEPENDENT OUTDOOR ADVERTISING BUSINESS



LEGEND

Direction of Contact ——→

Interchangeable Contact ←——→

R. — Citation from Transcript or Record.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 41

C. E. STEVENS COMPANY (a corporation); C. E. STEVENS TACOMA COMPANY (a corporation); and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation); GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO. (a corporation); GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 867

C. E. STEVENS COMPANY (a corporation); C. E. STEVENS TACOMA COMPANY (a corporation); and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation); GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO. (a corporation); GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

This is an action brought by petitioners (plaintiffs below) under Section 7 of the Sherman Act (July 2, 1890, Chap. 647, 26 Stat. 210, U.S.C., Title 15, sec. 15) praying for treble damages claimed to have been caused by an alleged conspiracy on the part of the respondents to monopolize the outdoor advertising business on the Pacific Coast.

The action was filed in the District Court of the United States for the Western District of Washington, Northern Division, on February 27, 1933. While the case was pending there, the petitioners filed three complaints, all of which the District Court held to be bad for one reason or another. On April 26, 1939, the District Court entered a judgment of dismissal after sustaining respondents' demurrer to petitioners' second amended complaint. Petitioners thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of dismissal. (*C. E. Stevens Co. et al. v. Foster & Kleiser Co. et al.* (9 Cir., 1940), 109 F. (2d) 764.)[1] The petition seeks a review of the decision of the Circuit Court of Appeals.

Respondents are opposed to the granting of the petition for several reasons, the principal one being that the decision of the Circuit Court of Appeals involves, in the last analysis, the question of whether the allegations of petitioners' second amended complaint are *sufficiently definite* to constitute a good pleading.

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1. The official report of the decision is still in advance sheet form and we therefore make our references to the Opinion of the Circuit Court of Appeals as printed in the Transcript of Record, pp. 81-97.

During the seven years while the case was pending below, the petitioners should have been able to frame a cause of action in accordance with the rules of good pleading. Yet, the second amended complaint in the case at bar is forty-eight pages in length (R. 2-49), is almost wholly devoted to an argumentative statement of petitioners' theory of the case, and is replete with conclusions of law. On the vital issue of whether petitioners sustained injury to their business or property by acts committed in furtherance of the alleged conspiracy to restrain commerce in posters, they have resorted to mere general and sweeping charges of obstruction to the business of independents generally.

Under these circumstances, petitioners are not entitled to a further review of their complaint. Whether the Circuit Court of Appeals for the Ninth Circuit correctly decided that the pleading is too indefinite upon vital matters is not a question of such importance as to require a review by this Court.[2]

The reasons advanced by petitioners for an allowance of the writ are based upon an incorrect statement of the facts. Therefore, we present a brief statement of the substance of their second amended complaint, and the reasons given by the Circuit Court of Appeals for its decision affirming the District Court's judgment of dismissal.

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2. See Rule 38, subd. 5, Revised Rules of the Supreme Court of the United States.

Summary of petitioners' second amended complaint.

The claim presented by petitioners' second amended complaint may be summarized as follows:

Petitioners and respondent Foster and Kleiser Company are competitors engaged in the billboard business on the Pacific Coast. (R. 3, 4, 6.) The business of the parties consists of posting and painting advertisements on billboards and of soliciting and entering into contracts for the performance of billboard services. (R. 4-11.) In the course of their business the parties use posters, designs and other materials which reach the Pacific Coast states through the channels of interstate commerce. (R. 5-12.) The parties, however, had nothing to do with the shipment of posters or other materials in interstate commerce but received them from the advertiser or the lithographer; after which the posters were displayed on billboards in accordance with the posting contracts. (R. 17.)

In an attempt to show that posting contracts are interstate transactions, the petitioners have alleged that posting contracts are agreements to ship posters in interstate commerce. (R. 4.) Such allegations, however, are to be disregarded because, if not conclusions, they are, at the very least, controlled[3] or neu-

3. The rule of pleading that specific allegations control inconsistent general allegations is elementary.
Foster & Kleiser Co. v. Special Site Sign Co. (9 Cir., 1936), 85 F. (2d) 742, at p. 745 (certiorari denied, 299 U.S. 613);
Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (8 Cir., 1905), 137 Fed. 80, at p. 85.

tralized[4] by the more specific and inconsistent allegations appearing elsewhere in the complaint that the contract for posting to which the billboard operator is a party is entirely different from the agreement between the advertiser and lithographer for the manufacture and shipment of posters. (R. 17.) Furthermore, where allegations of a pleading are inconsistent or contradictory, the pleader is bound by those most favorable to his opponents.[5]

It is claimed that in 1915, respondent Foster and Kleiser Company entered into a conspiracy to monopolize the billboard business on the Pacific Coast (R. 18-19) by controlling advertising agencies, preventing the interstate shipment of posters to independent plants and to advertisers dealing with independent plants, and by predatory acts committed against competitive billboard locations. (R. 20.)

Respondents are alleged to have furthered the conspiracy by committing acts which may be summarized as follows:

1. Threats and refusals by and through associations in which respondent Foster and Kleiser Company held memberships to post lithographs in cases where lithographers and advertisers dealt with inde-

4. Inconsistent, repugnant or contradictory averments of matters of substance neutralize each other and render the pleading defective on demurrer.
49 *Corpus Juris*, p. 99;
Ryland v. Hollinger et al. (8 Cir., 1902), 117 Fed. 216, at p. 219;
Sternberg v. Wakonda Drainage and Levee District (7 Cir., 1929), 33 F. (2d) 451, at p. 452.

5. 49 *Corpus Juris*, p. 119;
Wannamaker v. Edisto Nat. Bank of Orangeburg (4 Cir., 1933), 62 F. (2d) 696;
Ryland v. Hollinger et al. (8 Cir., 1902), 117 Fed. 216;
Johnson v. Steele (Ore., 1936), 59 Pac. (2d) 237, at p. 243; 154 Or. 137.

pendents. It is indefinitely claimed that this resulted in general obstruction to the business of independents. (R. 21-26.)

2. A tie-up between respondent Foster and Kleiser Company and General Outdoor Advertising Company whereby Foster and Kleiser Company secured all national advertising posting contracts to be executed on the Pacific Coast. (R. 26-36.) There is no allegation, however, that these national advertising posting contracts were secured by Foster and Kleiser Company by placing any direct restraints upon interstate commerce in posters.

3. Local predatory acts which prevented competitors of respondent Foster and Kleiser Company from securing billboard locations and posting contracts. (R. 36-44.)

As the result of these acts, respondent Foster and Kleiser Company (so it is claimed) acquired 90% of the billboard business on the Pacific Coast.

In so far as the second amended complaint is definite and specific on the issue of damages, it appears that all the damages sustained by petitioners were caused by inability to secure posting contracts and billboard locations—none is specifically alleged to have been caused by any acts furthering the alleged conspiracy to prevent competitors from receiving posters in interstate commerce.

Summary of reasons given by Circuit Court of Appeals for its decision affirming the District Court's judgment of dismissal.

In affirming the judgment of dismissal, the Circuit Court of Appeals conceded, at the outset, that the second amended complaint pleaded a conspiracy to prevent competitors from obtaining posters in interstate commerce and that such a conspiracy was in violation of the Sherman Act. (R. 86-87.) The Court held, however, that the petitioners did not show with the definiteness and clearness required by the rules of good pleading wherein they were injured by any acts committed in furtherance of the unlawful conspiracy. General indefinite allegations of obstruction to the business of independents generally were held to be insufficient. (R. 87-88.)

The specific allegations of injury (said the Court) showed that petitioners' damages were caused by acts which had no direct or immediate restraint upon interstate commerce; and, in view of the primary aim of the monopoly, were not committed in furtherance of any purpose to restrain interstate trade or commerce. It was conceded that the Sherman Act can be violated by imposing a direct restraint upon interstate commerce, even though the primary object of the conspiracy is to monopolize a local business, and the Court made it clear that it did not mean to announce a different rule. (R. 89-90.) However, since the pleading did not definitely and clearly show damages caused by the unlawful conspiracy, and, on the contrary, did definitely show that all the damages sustained by

petitioners were caused by acts not prohibited by the Sherman Act, the pleading was held to be fatally defective on demurrer.

Litigants seeking damages under the Sherman Act cannot succeed by the device of pleading a conspiracy to restrain interstate commerce in cases where their damages are caused by acts which did not directly restrain interstate commerce, and were not intended to restrain interstate commerce. (R. 90.)

It was the theory of the petitioners in the Court below, as it is here, that the outdoor advertising business is *per se* interstate commerce, and that a monopoly thereof is, *ipso facto,* a violation of the Sherman Act. This claim was rejected by the Circuit Court of Appeals (R. 93) on the authority of *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U. S. 613).

The Court found it unnecessary to determine the correctness of petitioners' claim that the scope of the Sherman Act has been expanded by recent decisions of this Court arising under the National Labor Relations Act. (R. 93-96.)

No abuse of discretion was found in the District Court's refusal of further leave to amend. (R. 96-97.)

We next consider the reasons why this Court should deny the petition to review the decision just summarized.

ARGUMENT.

Summary.

The decision of the Circuit Court of Appeals involves primarily the question whether petitioners' pleading was sufficiently definite on the issue of damages. *This in itself is a complete answer to the petition because a question of definiteness in the form of pleading is not of sufficient importance to require review by this Court.*

The record presents only one of the questions stated in the petition,[6] i. e., whether the business of posting lithographs on billboards and entering into contracts with advertisers for the performance of such service is interstate commerce *per se,* so that a monopoly of such business is in restraint of interstate trade and commerce in violation of the Sherman Act. This question was decided by the Circuit Court of Appeals in conformity with previous decisions of this Court on the same general subject, and does not require further review here.

I. THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS A REVIEW OF A DECISION WHICH IS BASED PRIMARILY UPON PETITIONERS' FAILURE TO CONFORM WITH AN ELEMENTARY RULE OF PLEADING, VIZ., THAT IN AN ACTION FOR DAMAGES UNDER THE SHERMAN ACT THE PLAINTIFF MUST PLEAD WITH DEFINITENESS FACTS SHOWING WHEREIN HE WAS INJURED BY A VIOLATION OF THE ACT.

An analysis of the opinion of the Circuit Court of Appeals discloses that its decision rests primarily

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6. The only question stated in the petition which is presented by the record is question 3, at pp. 8-9 of the petition.

upon the failure of petitioners to plead definitely facts as distinguished from conclusions showing wherein they were injured by the alleged conspiracy to restrain interstate trade and commerce in posters.

The Circuit Court of Appeals conceded that a violation of the Sherman Act had been pleaded.

Whether the petitioners have pleaded a conspiracy to restrain interstate trade and commerce in posters and lithographs is not at issue. A conspiracy to restrain such commerce is alleged in paragraphs VII and VIII of petitioners' second amended complaint. (R. 19-20.) We conceded below, as we do here, that petitioners have pleaded a conspiracy to restrain interstate commerce; and the Circuit Court of Appeals quoted and adopted our concession in its opinion. (R. 87.)

The Circuit Court of Appeals based its decision primarily upon the ground that petitioners' pleading of an unlawful conspiracy was not enough because in an action for damages under the Sherman Act plaintiff must definitely plead facts showing wherein he was injured by acts committed in furtherance of the conspiracy.

The unlawful conspiracy alleged by petitioners was a scheme to prevent independent billposters from securing lithographs and posters in interstate commerce for the purpose of preventing the independent billposters from carrying on their local business of billposting. Although the ultimate purpose of the

conspirators was to restrain a local business, nevertheless such a scheme would clearly violate the Sherman Act.

Ramsay Co. v. Bill Posters Assn. (1923), 260 U. S. 501; 43 S. Ct. 167; 67 L. Ed. 368.

However, the petitioners failed to plead the commission of any overt acts in furtherance of this conspiracy except in paragraph X of their second amended complaint (R. 21-26), wherein it is alleged that the conspirators by and through action of the Association made threats and refusals to post lithographs[7] in cases where lithographers and advertisers dealt with independents. It is claimed that *independents* were thereby obstructed and hindered in their business. (R. 23, 26.)

The Circuit Court of Appeals had no alternative but to hold that such allegations were not sufficiently definite to show that petitioners were injured in their business and property by acts committed in furtherance of the alleged conspiracy. As the Circuit Court of Appeals stated in its opinion (R. 88):

> "This is not a definite allegation that appellants were unable to obtain posters or lithographs with which to execute their advertising contracts because of the activities of appellees or that advertisers seeking to deal with appellants were unable to secure posters for posting by appellants. If

7. The conspirators themselves are not alleged to have made these threats. The Association is not alleged to be in the business of posting or in the business of buying or selling posters. The Association is not named as a conspirator. *There is nothing in the record to support the statement at p. 4 of the petition that the Association refuses to buy posters or lithographs from lithographers who sell posters and lithographs for display on independent display plants.*

that was in fact the case, appellants should have alleged it to be so, definitely and clearly. * * *"

In holding that an indefinite sweeping allegation of obstruction to the business of independents generally is insufficient, the Circuit Court of Appeals was applying an elementary principle of pleading. It is well settled that in cases of this character such allegations must be disregarded on demurrer and cannot be considered in determining whether the petitioners have stated a cause of action.[8]

The case which petitioners have attempted to make out in their petition and supporting brief, and the argument which Justice Haney advanced in his dissenting opinion are based upon conclusions of law that the activities of respondents unreasonably restrained interstate commerce in posters. Such conclusions of law must be disregarded.[9]

Disregarding the conclusions of law and the indefinite allegations of obstruction to the business of independents generally, there is nothing in the pleading which shows a direct restraint upon the interstate

8. *Shurtz v. Foster & Kleiser Co. et al.* (1939), 29 Fed. Supp. 162, at p. 164;
Ebeling v. Foster & Kleiser Co. (D.C., W.D., Wash., N.D., 1935), 12 Fed. Supp. 489, at p. 490;
Alexander Milburn Co. v. Union Carbide & Carbon Corp. (4 Cir., 1926), 15 F. (2d) 678, at p. 680;
Gerli v. Silk Assn. of America (D.C., S. D., New York, 1929), 36 F. (2d) 959, at p. 960.

9. *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742, at pp. 745, 753 (certiorari denied, 299 U.S. 613);
Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir., 1934), 72 F. (2d) 885, at p. 888;
Lipson v. Socony-Vacuum Corp. (D.C., D. Mass., 1934), 7 Fed. Supp. 961, at p. 964;
Alexander Milburn Co. v. Union Carbide & Carbon Corp. (4 Cir., 1926), 15 F. (2d) 678, at p. 680;
Witherell & Dobbins Co. v. United Machinery Co. (1 Cir., 1920), 267 Fed. 950, at pp. 955, 956.

shipment of posters to the injury of petitioners. The business of posting lithographs on billboards and contracting for the performance of such service is a local business. The specific allegations of the complaint show that any injury to petitioners was caused by acts directed against these local transactions; and that such acts did not have, and were not intended to have, any direct or immediate effect upon interstate commerce in posters. As stated by the Court (R. 88):

> "* * * An analysis of the complaint as a whole shows that the alleged damage to appellants flowed not from inability of appellants to obtain posters but from inability to obtain advertising contracts and billboard sites upon which to execute the same."

The question of whether a complaint is sufficiently definite to conform with the rules of good pleading is not of sufficient importance to require review by this Court.

This is not a matter which requires further review. Petitioners have filed three complaints in the District Court and had ample opportunity there to place their pleading in proper form. They had the benefit of the opinion of the Circuit Court of Appeals in its review of a parallel case in the same circuit (*Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742; certiorari denied 299 U. S. 613) before they filed their last complaint. Finally, they have had a full and complete appellate review of this case by the Circuit Court of Appeals. Since the basic question involved in the decision of the Circuit Court of Appeals is whether petitioners have definitely pleaded

facts showing wherein they were injured by a violation of the Sherman Act, there appears to be no special or important reason to review the matter on a writ of certiorari. (Revised Rules of the Supreme Court of the United States, Rule 38, subd. 5.)

II. THE PETITION SHOULD BE DENIED BECAUSE THE RECORD DOES NOT PRESENT THREE OF THE FOUR QUESTIONS STATED IN THE PETITION, AND THE REMAINING QUESTION WAS DECIDED BELOW IN ACCORDANCE WITH WELL SETTLED DECISIONS OF THIS COURT ON THE SAME GENERAL SUBJECT.

The petition states four questions which are asserted to be presented by the decision of the Circuit Court of Appeals. (Petition, pp. 8-9.) Only one of these four questions is presented by the record, i. e., whether the outdoor advertising business is *per se* interstate commerce. The other three questions are not presented by the record, as the Circuit Court of Appeals did not make the statements on which they are based.

The first question stated by petitioners at page 8 of the petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, that the main object of the conspirators being to monopolize the intrastate aspects of the business, the intent to accomplish that purpose by restraining interstate commerce is not within the scope of the Sherman Act.

Petitioners' main attack against the decision of the Circuit Court of Appeals is grounded upon the asser-

tion that the decision announced a new and erroneous doctrine,—the doctrine that since the ultimate object of the conspirators was to control transactions local in character, there was no violation of the Sherman Act, even though the conspirators intended to accomplish their main object by preventing posters from reaching competitors through the channels of interstate commerce. The first question stated in the petition assumes that such an erroneous doctrine was announced.

The Circuit Court of Appeals neither stated nor held that where the main purpose of the conspirators is to control local transactions, an accomplishment of that purpose by placing direct restraints on interstate commerce is outside the scope of the Sherman Act. On the contrary, the Circuit Court of Appeals expressly disavowed the announcement of any such doctrine, and, in this connection, made the following statement in its opinion (R. 89-90):

> "We do not hold that because the ultimate object of a conspiracy is to obtain a monopoly of intrastate business or commerce such an object can be brought about by a restraint of interstate commerce without violating the Sherman Anti-Trust law. This is not the law. See, Bedford Cut Stone Co. v. Journeymen S.C. Ass'n., 274 U. S. 37, 47."

The Circuit Court of Appeals did hold, and correctly so, that petitioners' damages are not shown by their pleading to have been caused by acts committed in furtherance of the alleged conspiracy to prevent competitors from obtaining posters in interstate com-

merce; and that the acts which are shown to have damaged petitioners were directed, not against control of the poster trade, but rather, against local activities.

Of course, if the local acts which caused petitioners' injury did directly and immediately restrain interstate commerce in posters, petitioners would have been entitled to recover damages caused by such acts, regardless of the ultimate object of the conspirators. The Court did not announce any rule to the contrary. However, there is no showing in the second amended complaint, except by conclusions of law which must be disregarded, that interstate commerce in posters was directly restrained by preventing the acquisition and use of billboards and by obtaining a monopoly of posting contracts,—activities intrastate in character.

Petitioners have missed the whole point of the decision below concerning the significance of the conspirators' primary intent to restrain only local activities. The observations of the Circuit Court of Appeals upon this subject were thought to be necessary only because this Court has so often announced[10] the rule that acts which apparently have no direct and immediate restraint upon interstate commerce are nevertheless in direct violation of the Sherman Act if they are committed for the purpose of thereby restraining or controlling interstate commerce. After

10. *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn.* (1927), 274 U. S. 37; 47 S. Ct. 522; 71 L. Ed. 916;
Coronado Coal Company v. United Mine Workers of America (1925), 268 U. S. 295; 45 S. Ct. 551; 69 L. Ed. 963;
Loewe v. Lawlor (1908), 208 U. S. 274; 28 S. Ct. 301; 52 L. Ed. 488; at p. 502.

See also:
Schechter Corp. v. United States (1935), 295 U. S. 495, at p. 547; 55 S. Ct. 837; 79 L. Ed. 1570.

reviewing the decisions of this Court upon that subject, the Circuit Court of Appeals stated that the complaint at bar shows that the damaging activities of the conspirators were not committed for the purpose of controlling interstate commerce in posters. It was in this connection that the Court made the following statement, which petitioners criticize. (R. 92-93):

> "* * * In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust Act, supra, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting."

This is not a holding, nor did the Circuit Court of Appeals anywhere state in its opinion, that damages caused by acts which directly restrained interstate commerce in posters are not recoverable where the whole purpose of the conspirators is to control the local business of securing advertising contracts and billposting.

In discussing this question in their supporting brief, petitioners suggest that a direct restraint upon the interstate transportation of posters is alleged because (so they claim) posting contracts are agreements to

ship posters in interstate commerce and a monopoly thereof by eastern tie-ups is *per se* a violation of the Sherman Act. This argument, however, is based upon a misstatement of the allegations of their second amended complaint, as the specific allegations of the complaint show definitely that the billposter has nothing to do with the interstate shipment of posters. Any conclusions of law or general allegations to the contrary are controlled or neutralized by such specific allegations.[11]

The second question raised by petitioners at page 8 of their petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, "that the complaint failed to allege with sufficient definiteness and clearness that petitioners by reason of the primary aim of the monopoly were unable to secure posters or lithographs with which to execute their advertising contracts or that advertisers seeking to deal with petitioners were unable to secure posters for posting by petitioners."

The Circuit Court of Appeals held, it is true, that petitioners did not definitely and clearly allege in their pleading that they were unable to secure posters or lithographs or that advertisers seeking to deal with petitioners were unable to secure posters to be posted by petitioners. However, the Court did not, as petitioners contend, base that holding on the primary aim of the monopoly.

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11. See footnotes 3 and 4 at pp. 4-5 of this brief.

Obviously, the primary aim of the monopoly has no relation to the question of whether the petitioners definitely pleaded an inability to secure posters. If petitioners were unable to obtain posters by reason of the conspiracy and had definitely pleaded that fact, the primary aim of the monopoly could not render indefinite a pleading otherwise definite. There is nothing in the Court's opinion to the effect that the primary aim of the monopoly is to be considered in determining whether or not a pleading of injury is definite.

The Court's observations on the primary aim of monopoly were *not made* upon the issue of whether the pleading was definite on the subject of damages; but, on the contrary, the Court made these observations in considering whether the *definite allegations of injury* were caused by acts prohibited by the Sherman Act. The Court held that the *definite allegations of injury* show damages caused by acts which have no direct or immediate restraint upon interstate commerce, and, in view of the primary aim of the monopoly, were not committed in furtherance of any purpose to restrain interstate trade or commerce. Since the pleading did not definitely and clearly show damages caused by the unlawful conspiracy, and, on the contrary, did definitely show that all the damages sustained by petitioners were caused by acts not prohibited by the Sherman Act, the pleading was held to be fatally defective on demurrer.

Although the third question stated by petitioners at pages 8-9 of the petition is presented by the record, it does not require review by this Court because the decision of the Circuit Court of Appeals that the outdoor advertising business of the parties is not interstate commerce is in accord with well settled decisions of this Court.

Petitioners claim that the outdoor advertising business of the parties is interstate commerce *per se,* so that a monopoly thereof, *ipso facto,* constitutes a violation of the Sherman Act. They ask to have this question reviewed. (Petition, pp. 8-9.)

Although the question is presented by the record, it does not require review here. This Court has already held that the business of the parties as described in the pleading is not interstate commerce.

The second amended complaint shows that the outdoor advertising business consists of painting and posting advertisements on billboards and soliciting and performing contracts for such painting and posting of advertisements. The posting itself is performed with posters, which, assuming them to be articles of commerce, are nevertheless out of the channels of interstate commerce when used by the parties. The posting, therefore, is a local business.

In *Packer Corporation v. Utah* (1932), 285 U. S. 105; 52 S. Ct. 273; 76 L. Ed. 643, this Court said of the outdoor advertising business at page 112:

> "* * * Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate

business, the commerce clause interposes no barrier to its effective control of *advertising essentially local.* * * *'' (Emphasis supplied.)

In *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U.S. 613), the Court said at page 753:

"* * * Therefore, as the outdoor advertising business is not interstate, but is local in character, the theory of the pleader must fail to that extent."

In *General Outdoor Advertising Co. v. Dept. of Public Works* (1925), 193 N.E. 799; 289 Mass. 149, the Court stated at page 811:

"* * * **The outdoor advertising business of the several plaintiffs is intrastate and not interstate business or commerce.** * * *'' (Emphasis supplied.)

The contract for posting is a contract for the performance of a local act, and, hence, is not an interstate transaction. The circumstance that the billposting contracts are made between persons residing in different states does not transform the transaction into an interstate one.

Ware & Leland v. Mobile County (1908), 209 U. S. 405, at p. 413; 28 S. Ct. 526; 52 L. Ed. 855;

Blumenstock Bros. Adv. Agency v. Curtis Pub. Co. (1920), 252 U. S. 436; 40 S. Ct. 385; 64 L. Ed. 649.

The second amended complaint affirmatively shows that the only interstate commerce involved in the billposting business is the interstate shipment of posters,

lithographs, stencils and similar materials; and that shipment of these articles is made to the billposter upon the direction of the advertiser. The shipment is a separate "and different" transaction from the posting contract. (Second Amended Complaint, Par. VI; R. 17.) The local character of the billboard business is not affected by the circumstance that the plant operator uses material shipped to him in interstate commerce. Local business does not become interstate in character because it employs material locally which at one time crossed state lines.

Schechter Corp. v. United States (1935), 295 U. S. 495, at pp. 542-543; 55 S. Ct. 837; 79 L. Ed. 1570.

Since the business of soliciting, entering into, and performing posting contracts is local and not interstate, a monopoly of the business is not a monopoly of interstate commerce, and damages caused by such monopoly are not recoverable. *Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501; 43 S. Ct. 167; 67 L. Ed. 368, relied upon by petitioners, is distinguishable because in that case the plaintiffs prepared, designed, purchased and sold posters in interstate commerce and thus were engaged in interstate commerce. Furthermore, the plaintiffs' damages in the *Ramsay* case were caused by an attempt or conspiracy to monopolize the local business in billposting by restraining the interstate shipment of posters, whereas in the complaint at bar petitioners failed to show definitely any injury of this character.

The fourth question stated by petitioners at page 9 of the petition is not presented by the record because the Circuit Court of Appeals did not hold, as petitioners contend, that the Sherman Act does not apply to intrastate activities which "directly affect interstate commerce".

Petitioners claim that the scope of the Sherman Act has been "expanded" by recent decisions of this Court arising under the National Labor Relations Act so as to cover intrastate activities which "directly affect interstate commerce". They say that the Circuit Court of Appeals held that the Sherman Act does not cover activities which "directly affect interstate commerce", and ask to have the question reviewed.

The question is not presented by the record. Nowhere in the opinion of the Circuit Court of Appeals does any statement appear to the effect that intrastate activities which "directly affect interstate commerce" are not within the Sherman Act. On the contrary, the Court held that interstate commerce in the case at bar was only incidentally affected by the activities complained of and that the Sherman Act does not cover activities which might incidentally affect interstate commerce. We quote from the Court's opinion on this subject (R. 95, Footnote):

> "The Anti-Trust Act does not declare unlawful conspiracies to control local trade which may *incidentally* affect interstate commerce." (Emphasis supplied.)

There is nothing in the Court's decision which can be considered a holding that the Sherman Act does

not apply to intrastate activities which "directly affect interstate commerce". It was the Court's view that since the activities complained of affected interstate commerce only incidentally, and since the Sherman Act does not cover local activities having an incidental effect upon interstate commerce, it was unnecessary to inquire further concerning the constitutional power of the Congress under the commerce clause.

Apart from the fact that there is nothing in the record which presents the question, it is clear that the constitutional power of Congress under the commerce clause and the exercise of that power under the Sherman Act are two separate matters. Unquestionably the Congress has the constitutional power to regulate local activities directly affecting interstate commerce where it is thought that such regulation is necessary to protect interstate commerce from undue burdens. The cases cited at page 35 of petitioners' supporting brief are all to this effect.[12]

Has the Congress undertaken in the Sherman Act to regulate the local acts which are alleged to have caused petitioners' injury in the case at bar? This Court has consistently held that the Sherman Act does not apply to activities which only indirectly and remotely restrain interstate commerce and which are not done for

12. *National Labor Relations Board v. Jones & Laughlin S. Corp.* (1937), 301 U. S. 1; 57 S. Ct. 615; 81 L. Ed. 893;
National Labor Relations Board v. Fainblatt (1939), 306 U. S. 601; 59 S. Ct. 668; 83 L. Ed. 1014;
Santa Cruz Fruit Pack. Co. v. National Labor Relations Board (1938), 303 U. S. 453; 58 S. Ct. 656; 82 L. Ed. 954;
United States v. Rock Royal Co-Operative (1939), 307 U. S. 533; 59 S. Ct. 993; 83 L. Ed. 1446;
Currin v. Wallace (1939), 306 U. S. 1; 59 S. Ct. 379; 83 L. Ed. 441.

the purpose of interfering with interstate commerce.[13] The circumstance that the Congress may have subsequently determined in other legislation to exercise its constitutional power over a broader field of local transactions is of no importance. Therefore, decisions of this Court approving this broader exercise of constitutional power under the National Labor Relations Act obviously have no application to the question of how much power the Congress intended to exercise under the Sherman Act.[14]

It is not necessary for this Court to review the question of whether Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, is controlling in the case at bar.

Although the petition does not present this as a question, nevertheless petitioners assert in their reasons relied upon for the allowance of the writ,[15] in their assignments of error,[16] and in their supporting brief,[17] that *Foster & Kleiser Co. v. Special Site Sign Co.* (9 Cir., 1936), 85 F. (2d) 742 (certiorari denied, 299 U. S. 613) is not controlling.

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13. *United Mine Workers v. Coronado Coal Co.* (1922), 259 U. S. 344, at pp. 410, 411; 42 S. Ct. 570; 66 L. Ed. 975;
United Leather Workers v. Herkert (1924), 265 U. S. 457, at pp. 464-467; 44 S. Ct. 623; 68 L. Ed. 1104;
Industrial Assn. v. United States (1925), 268 U. S. 64, at p. 82; 45 S. Ct. 403; 69 L. Ed. 849;
Levering & G. Co. v. Morrin (1933), 289 U. S. 103, at pp. 107, 108; 53 S. Ct. 549; 77 L. Ed. 1062.

14. *Leader et al. v. Apex Hosiery Co.* (1939), 108 F. (2d) 71, at p. 81 (certiorari granted Feb. 26, 1940);
Wilson & Co. v. Birl et al. (D.C., E.D., Pa., 1939), 27 Fed. Supp. 915;
51 *Harvard Law Review*, pp. 169-170;
39 *Columbia Law Review*, p. 1247.

15. Reason 3, petition pp. 9-10.

16. Assignment II, petitioners' supporting brief, p. 14.

17. Point II of petitioners' argument in supporting brief, pp. 29-32.

Whether the decision in the *Special Site* case is or is not controlling is a question of no importance to this Court. Both decisions were rendered by the same Circuit Court of Appeals, so that there is no question of a conflict of decisions between different circuits on the same matter.

The similarity between the two cases is so adequately presented in the opinion of the Circuit Court of Appeals as to render unnecessary a reply to petitioners' argument that the cases are substantially different.

CONCLUSION.

It is submitted that the petition herein should be denied.

Dated, San Francisco, California,
April 24, 1940.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1940

No. 41

C. E. STEVENS COMPANY (a corporation), C. E. STEVENS TACOMA COMPANY (a corporation), and C. E. STEVENS COMPANY OF OREGON (a corporation),

Petitioners,

vs.

FOSTER & KLEISER CO. (a corporation), GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, JR., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO. (a corporation), GERALD O'NEIL, LYLE ABRAHAMSON, PAUL DUEBER, WALTER STEVENS and GEORGE SMITH,

Respondents.

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vs.

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Respondents.

BRIEF FOR RESPONDENTS.

OPINIONS OF THE COURTS BELOW.[1]

The opinion of the Circuit Court of Appeals for the Ninth Circuit, to which court a writ of certiorari has been directed, is officially reported in 109 F. (2d) 764, and appears in the Record at pp. 81-97.

The opinion of the District Court for the Western District of Washington, Northern Division, sustaining respondents' demurrer to petitioners' second amended complaint is not officially reported. It is embodied in a letter to counsel for the respective parties, and appears in the Record at pp. 54 and 55.

THE JURISDICTION OF THIS COURT.

Petitioners have invoked the jurisdiction of this court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 938, 28 U.S.C.A. Sec. 347(a).)

This court granted a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, on May 6, 1940.

STATEMENT OF THE CASE.

This brief is submitted on behalf of the four respondents upon whom service of process was made, namely, Foster and Kleiser Company (sued herein as "Foster & Kleiser Co."), a corporation, George

1. Unless otherwise stated, emphasis has been supplied by the writers of this brief.

W. Kleiser, Restop Realty Company, a corporation, and Gerald O'Neil.

The statement of the petitioners contains inaccuracies and omissions, particularly with reference to the relationship of the billboard business[2] to interstate commerce. We therefore here set out a statement of the case which will serve to correct the more outstanding inaccuracies and omissions.

This action was brought by petitioners (plaintiffs below) under Section 7 of the Sherman Act (July 2, 1890, Chap. 647, 26 Stat. 210, U.S.C., Title 15, Sec. 15) praying for treble damages claimed to have been caused by an alleged conspiracy of the respondents (defendants below) to monopolize the outdoor advertising business on the Pacific Coast.

The action was filed in the District Court of the United States for the Western District of Washington, Northern Division, on February 27, 1933. While the case was pending there, the petitioners filed an original and two amended complaints, all of which the District Court held to be bad for one reason or another. On April 26, 1939, the District Court entered a judgment of dismissal after sustaining respondents' demurrer to petitioners' second amended complaint. (R. 54-55.) Petitioners thereupon appealed to the Circuit Court of Appeals for the Ninth Circuit, which affirmed the judgment of dismissal on February 19, 1940. (R. 111.)

2. Called in the second amended complaint and in the petition and briefs of petitioners the "outdoor advertising business."

On May 6, 1940, this court granted a petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. (R. 114.)

SUMMARY OF THE COMPLAINT.

For the convenience of the court we shall refer to petitioners' second amended complaint as "the complaint".

The complaint is framed in three counts, the first (R. 3-45) on behalf of C. E. Stevens Company, the second (R. 45-47) on behalf of C. E. Stevens Tacoma Company, and the third (R. 47-49) on behalf of C. E. Stevens Company of Oregon. Stripped of argument and conclusions of law the complaint states the following facts:

The Parties.

Petitioners are three corporations engaged in the billboard business in the states of Washington and Oregon. Petitioner C. E. Stevens Company (plaintiff in the first count) is alleged to be the "parent company", and the other two petitioners (plaintiffs in the second and third counts respectively) are alleged to be "subsidiaries of the parent company, functioning principally as branch offices of the parent company."[3] (R. 3-4.)

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3. It is to be noted that in this connection it is also alleged (R. 4) "that all business activities relating to the C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are directed through the C. E. Stevens Company".

The defendants[4] are Foster and Kleiser Company; four of its officers and employees (George W. Kleiser, President; Walter P. Foster, Vice-President; Albert Mortenson, Treasurer; Gilman Haynes, Lease Manager); Restop Realty Company, and its Washington statutory agent, Gerald E. O'Neil.

The respondent Foster and Kleiser Company is a Nevada corporation engaged in the billboard business in the states of Washington, Oregon, California and Arizona, and other states of the United States. (R. 6.) Foster and Kleiser Company has its principal place of business in the City of San Francisco, and branch offices throughout the Pacific Coast, and, in addition, has branch offices in Chicago, Illinois, and New York City. (R. 8.)

The respondent Restop Realty Company is in the business of owning, holding and leasing real property and outdoor advertising, that is billboard, sites in the Pacific Coast states of Oregon, Washington, California and Arizona. More than 50% of its voting stock is owned and controlled by respondent Foster and Kleiser Company, and its officers and directors. (R. 9.)

Relationship of the Billboard Business to Interstate Commerce.

The parties are engaged in the business of soliciting, entering into and performing[5] poster advertis-

4. As already stated, process was served on only four of the defendants, viz.: Foster and Kleiser Company, George W. Kleiser, Restop Realty Company, and Gerald O'Neil.

5. The word used in the complaint is "execution", but the pleader must have meant "performing".

ing contracts, painted bulletin display contracts, painted wall display contracts, and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located in various states of the United States. (R. 4, 6.) The materials used in the billposting business are sold by lithographers who are located in states other than the Pacific Coast area, principally in Kentucky, Ohio and Illinois. (R. 10, 11.) For the most part, advertisers are located in states other than those comprising the Pacific Coast area. (R. 11.) Therefore, both petitioners and respondents, in the course of the billposting business, enter into a substantial number of posting contracts with persons located in other states, and a substantial number of the posters which are used in performing the contracts originate in states other than those comprising the Pacific Coast area, and have traversed state lines before they are posted on billboards in the Pacific Coast area.

The posting of a bill or poster upon a billboard *involves three different parties and two different transactions.* Usually the advertiser either directly or through his agency, contracts with the lithographer who makes the posters for the making of all the posters that the advertiser desires to use. (R. 17.) The advertiser then contracts with the plant owners, such as petitioners and respondent Foster and Kleiser Company, to place these posters upon a stated number of billboards. (R. 17.) The advertiser then directs[6]

6. The language of the averment is, "The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants."

the lithographer to forward the posters to the billposter, or has the lithographer deliver the posters to the advertiser's representative, who in turn forwards them to the billposter. (R. 17.) It will be seen from the foregoing that the shipment of posters in interstate commerce occurs upon the direction of the advertiser, and that the billposter has nothing whatsoever to do with the shipment of posters in interstate commerce. (R. 17.) We have not overlooked other allegations in the complaint to the effect that the posting contracts are agreements between the parties to ship posters in interstate commerce (R. 4); but we shall show in our argument later in the brief[7] that the specific allegations of the complaint allege (1) the contract between the advertiser and the billposter is an agreement for the display of posters on billboards; (2) the contract for the manufacture of the posters is a *different transaction* and is between the advertiser and the lithographer; and (3) the shipment of the posters is a *third and still different transaction* which occurs upon the direction of the advertiser to the lithographer,—all demonstrate affirmatively that the posting contract is merely an agreement for the local display of posters and that the shipment of the posters is a different transaction in which the billposter does not participate. These specific allegations of the complaint control and neutralize the inconsistent allegations elsewhere in the complaint (R. 4-8, 10-12) that the posting contract is an agreement for the interstate shipment of posters.

7. Brief, pp. 24-28.

Formation of the Conspiracy.

In the year 1915 respondent Foster and Kleiser Company and certain persons, unknown to petitioners, are alleged to have entered into a conspiracy. (R. 18-19.) The purpose of this conspiracy was "* * * to attempt to monopolize * * * in the Pacific Coast Area all branches of the outdoor advertising business * * * and particularly to prevent plaintiff * * * from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities whereby said independent plant owners could furnish a satisfactory advertising service to advertisers." (R. 19.) It is to be noted that petitioner C. E. Stevens Company (plaintiff in the first count) was not in existence prior to March 8, 1924 (R. 3),[8] and that neither of the other two petitioners was in existence prior to June 1, 1928. (R. 45, 47.)[9] Therefore, the allegation that the conspiracy

8. In the first sentence of the first count of the second amended complaint it is alleged (R. 3), "That plaintiff, C. E. Stevens Company, is now, and ever since March 8, 1924, and at all times herein mentioned has been, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, * * *."

9. In the first sentence of the second count of said complaint it is alleged (R. 45), "That plaintiff, C. E. Stevens Tacoma Company is now, and ever since about June 1, 1928, and at all times herein mentioned, has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington * * * That ever since June 1, 1928 plaintiff has been engaged in the business of outdoor advertising * * *."

In the first sentence of the third count of said complaint it is alleged (R. 47), "That C. E. Stevens Company of Oregon is now, and ever since

was particularly directed against petitioners must be disregarded because none of the petitioners was in existence in 1915 when the conspiracy is alleged to have been formed, and none of them came into existence for many years thereafter.

The Means by Which the Conspiracy Was to be Effected.

The means by which this conspiracy to monopolize the billposting business was to be effected are alleged to be:

> Control of advertising agencies and agencies selling national outdoor advertising. (R. 20.)
>
> Prevention of the shipment of posters in interstate commerce to independent plants. (R. 20.)
>
> Prevention of the sale of posters to advertisers displaying advertisements on independent bill poster plants. (R. 20.)
>
> Preventing plaintiff and other independents from securing plant facilities with which to secure posting contracts. (R. 20.)

Overt Acts in Furtherance of Conspiracy.

The overt acts which are alleged to have been committed in furtherance of the conspiracy fall into three general classes:

(1) Threats to refuse to post lithographs and posters, and actual refusal to post posters if litho-

about June 1, 1928, and at all times herein mentioned has been a corporation duly incorporated, organized and existing under and virtue of the laws of the State of Oregon, * * *; that ever since June 1, 1928, plaintiff company has been engaged in outdoor advertising * * *."

graphers or advertisers dealt with independent plants. (R. 23-24.)

These threats are not claimed to have been made by the conspirators themselves but rather "by and through" a trade association of which respondent Foster and Kleiser Company was a member. It is said that these threats and refusals resulted in a general obstruction to the business of independents. (R. 23, 24, 26.)

(2) An attempt is made to set forth the commission of overt acts in furtherance of an alleged conspiracy to control advertising agencies and other sources of national outdoor advertising. The allegations in support of this claim are both voluminous and extremely indefinite. By way of conclusion it is claimed that respondent Foster and Kleiser Company secured a monopoly of national outdoor advertising contracts by controlling advertising agencies and other sources of national business.

Later in this brief[10] we shall show that the complaint states no facts showing that the conspirators ever did control advertising agencies or other sources of national business, and, further, that the complaint states no facts showing that petitioners sustained damage by any act in furtherance of the alleged conspiracy to control national advertising at its source.

(3) So-called local predatory acts designed to prevent competitors of Foster and Kleiser Company

10. Brief, pp. 74-87.

from securing billboard locations, or from using billboard locations after they had been secured. (R. 36-44.)

Damages.

It is claimed by way of general conclusion, that petitioner C. E. Stevens Company was damaged in the amount of $350,000.00 (R. 45), C. E. Stevens Tacoma Company in the amount of $50,000.00 (R. 47) and C. E. Stevens Company of Oregon in the amount of $100,000.00. (R. 48.) The total claim, trebled, is for $1,500,000.00.

ARGUMENT.

Summary.

The billboard business consists of pasting and painting advertisements on billboards and is therefore an intrastate business. The billposter makes no shipments in interstate commerce. He uses posters produced in other states but has nothing to do with the shipment of the posters, as the posters are usually purchased by the advertiser and are shipped to the billposter upon the advertiser's direction.

A monopoly of the billposting business does not *per se* violate the Sherman Act because a monopoly of the business does not directly restrain interstate commerce, notwithstanding that billboard advertising is used to promote the interstate sale of goods, and that the billposter uses posters produced in other states.

The interstate commerce of the advertiser does not depend in any way upon, nor is it directly affected by, competitive conditions in the billboard industry. *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U.S. 436. Nor is the interstate business of the producer of posters directly affected by local competitive conditions in the billboard industry. The posters are produced and sold and shipped in interstate commerce regardless of which competitor in a particular locality secures the posting contract. The poster is usually purchased by the advertiser (R. 17) and the lithographer is not concerned with which one of several billposters the advertiser contracts for the local display of the poster. The destination of the posters in a particular locality will vary slightly depending upon which competitor secures the contract, but even this slight effect occurs not because of any direct control of respondents over the interstate shipment of the posters but rather beause local events have reduced the opportunity of one competitor or another to use posters. The interstate business of the eastern producer of posters is therefore entirely unaffected by the distant local competitive events in the Pacific Coast area and any variation in the normal interstate channel of posters is not only slight but is the indirect result of local events which have reduced the opportunity of competitors to use such posters locally. There is nothing in the Labor Board decisions of this court which would require a holding that a monopoly of the billboard business is *per se* in violation of the Sherman Act.

The court below correctly decided that the local acts complained of did not directly restrain commerce. However, if the acts had been committed for the purpose of interfering with interstate commerce they would have been in direct violation of the Sherman Act, even if, when separately considered, such acts did not directly restrain interstate commerce. The majority opinion below made its observations concerning the intent of the conspirators in order to demonstrate that the acts of the conspirators not only failed to restrain interstate commerce directly but were not performed with any purpose to interfere with that commerce.

A monopoly of the billboard business not being *per se* a violation of the Sherman Act, the remaining question is whether the means used to accomplish the monopoly bring the alleged acts of the conspirators within the scope of the statute.

The first means which the conspirators planned to use was to prevent competitors and their customers from securing posters in interstate commerce. (R. 19-20.) Although such means, if employed, would be in violation of the Sherman Act (*Ramsay Co. v. Bill Posters Assn.*, 260 U.S. 501), no facts are stated showing that petitioners or their customers were unable to obtain posters or that petitioners were in any way damaged by any acts in furtherance of this phase of the conspiracy.

The second means agreed upon was to control advertising agencies and other sources of national busi-

ness. (R. 20.) The complaint fails to show that this control was secured, that any acts were performed which would have had the effect of securing such control or that the petitioners suffered any damage by any acts done in furtherance of this phase of the alleged conspiracy.

The third means agreed upon was the commission of local predatory acts designed to prevent competitors from offering adequate posting facilities to advertisers. These local acts had no direct effect upon the interstate shipment of posters, for the reasons heretofore stated. The acts themselves were in no way related to the furtherance of the alleged conspiracy to restrain interstate commerce in posters or lithographs, for the performance of such acts would not result in a direct restraint of interstate commerce in posters or lithographs. Damages caused by acts which have no reasonable relation to a furtherance of the alleged conspiracy to place unlawful restraints on the interstate shipment of posters and lithographs are not recoverable.

The complaint affirmatively shows that the petitioners named in the second and third counts acted only in the capacity of agents or branches of the petitioner named in the first count. The petitioners in the second and third counts, therefore, have no right to join with the principal petitioner named in the first count in prosecuting this action as no damage is alleged except as to the business and property of C. E. Stevens Company (petitioner in the first count) for

whom they are alleged to have acted as agents. No facts are stated showing that petitioners in the second and third counts were damaged in their separate corporate capacity. Although this point is not raised in the petition for certiorari and was not decided by the Circuit Court of Appeals, nevertheless it was urged in the District Court, was briefed in the Circuit Court of Appeals, and is involved in the demurrers to the second and third counts. Respondents rely upon this point, in addition to those previously stated, as a further reason why the Circuit Court of Appeals was correct in affirming the District Court's dismissal of the second and third counts.

POINT ONE.

THE OUTDOOR ADVERTISING OR BILLPOSTING BUSINESS DESCRIBED IN THE COMPLAINT IS NOT INTERSTATE COMMERCE, NOR ARE POSTING OR ADVERTISING CONTRACTS INTERSTATE TRANSACTIONS, AND, THEREFORE, A MONOPOLY OF THE BILLPOSTING BUSINESS DESCRIBED IN THE COMPLAINT IS NOT PER SE A VIOLATION OF THE SHERMAN ACT.

The basic assumption of the complaint is that the billposting business as a whole must be considered as interstate commerce and that as a consequence a monopoly of the business is a violation of the Sherman Act. To support this untenable position, petitioners have dressed up their complaint with conclusions of law to the effect that the billposting business is interstate commerce. In addition, petitioners have misleadingly stated the facts in their brief and it may erro-

neously appear therefrom that the parties conduct an interstate business.

Misleading Statements in Petitioners' Brief Concerning the Nature of the Billposting Business as Described in the Complaint.

We deal first with the misleading statements in petitioners' brief concerning the claimed interstate character of the billposting business. It is said, at page 7 of their brief,[11] that Foster and Kleiser Company shipped posters from one state to another, and also designs and stencils for use in preparing painted displays on billboards. There is no allegation in the complaint to support such statements. At page 17 of their brief it is said[12] that an essential part of petitioners' business involves arranging for the interstate shipment of posters. There is no allegation in the complaint to support this statement. Other statements may be found at page 20 of petitioners' brief, where it is said[13] that

11. It is stated in the brief: "The outdoor advertising business of the petitioners and respondents is operated on a national scale. Foster & Kleiser Co. not only posted the posters and lithographs upon its billboards after they had been delivered to a town for that purpose but, throughout the country, it directly solicited and executed contracts for such services. As part of such contracts, it procured the necessary posters and lithographs for its patrons and shipped them from one state to another. Such interstate shipment was for the primary purpose of posting them on specified billboards supplied by respondents under the terms of the contracts. The same may be said as to the designs and stencils shipped by or to repondents for use in preparing painted displays upon their boards. Foster & Kleiser Co. is a national concern engaged in a nationwide business (R. 6-8)."

12. It is stated in the brief: "An essential part of petitioners' business involved arranging for the interstate shipment of posters, lithographs, paint designs and stencils, and receiving and displaying them."

13. At pages 19 and 20 of petitioners' brief, it is said: "It is obvious that the conspirators realized the most effective method of accomplishing their monopoly of the outdoor advertising business and the acquisition of the power to fix unreasonable prices in such business was to gather to themselves all the national contracts which, *per se*, entailed the shipment of posters and lithographs from one state to another."

national advertising contracts *per se* involve the interstate shipment of posters, and at page 29 of their brief, where it is said[14] that posting contracts contemplate the interstate shipment of posters.

Conclusions of the Pleader that the Billposting Business is Interstate Commerce Must be Disregarded.

The complaint is replete with conclusions of law to the effect that the billposting business is interstate commerce. In the very first paragraph of the complaint (R. 3), petitioners allege that they are engaged in interstate commerce. This conclusion is repeated again and again, and in paragraph after pargraph, with such frequency that it is difficult to cull the facts from the conclusions and the pleader argument. Little wonder that the district judge in his opinion (R. 54) stated:

> "that the Second Amended Complaint stripped of pleader argument and conclusion does not sufficiently state facts or factual basis for the alleged direct interstate interference by any of the defendants with plaintiffs' outdoor advertising business,";

or that District Judge St. Sure, in passing upon an identical complaint in the case of *Shurtz v. Foster and Kleiser Company*, 29 Fed. Supp. 162, stated, at page 163:

14. At page 29 of petitioners' brief it is said: "The contracts contemplate and the parties to this suit actuate the shipment of posters, lithographs, designs and stencils from third persons in other states to their 'plants' in the Pacific Coast Area in fulfillment of the contracts (R. 4-12)."

"Plaintiff's complaint is almost wholly devoted to an argumentative statement of his theory of the case, the history of outdoor advertising, and is replete with conclusions of law."

Conclusions of law respecting interstate commerce must be disregarded by the court in determining the sufficiency of the complaint.

Glenn Coal Co. v. Dickinson Fuel Co. (1934), 72 Fed. (2d) 885, at p. 888;

Alexander Milburn Co. v. Union Carbide and Carbon Corp., 4th Cir. (1926), 15 Fed. (2d) 678, at p. 680;

Witherell & Dobbins Co. v. United Shoe Machinery Co., 1st Cir. (1920), 267 Fed. 950, at pp. 955, 956.

Ramsay Co. v. Bill Posters Assn. Distinguished.

The *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167), is relied upon by petitioners, at page 46 of their brief, as authority for the proposition that the billposting business is interstate commerce. Because the *Ramsay* case is a decision of this court dealing with the general subject of unlawful restraints upon the interstate shipment of posters, it is desirable to determine at the outset just what this court actually held in that case.

The *Ramsay* case involved separate actions for treble damages under Section 7 of the Sherman Act, wherein the District Court dismissed the complaints upon demurrer, and this action was affirmed by the Circuit Court of Appeals on the ground that no cause

of action was stated. The cases were brought to this court on writ of error and it was held that the judgment of dismissal should be reversed inasmuch as the complaints stated a cause of action. The plaintiffs were advertising solicitors who prepared, designed, purchased *and sold posters in interstate commerce* and were, therefore, held by this court to be engaged in interstate commerce. (260 U. S. 501, at p. 509.)

The defendant, Bill Posters Association, in the *Ramsay* case was an organization of billposters throughout the United States and Canada. It was alleged in the complaint that the association and its members entered into a conspiracy to control the interstate trade and commerce in posters throughout the United States and Canada; and also that the defendants, by threats to withdraw their patronage, forced manufacturers of posters to refuse to furnish posters to independent billposters or to advertisers desiring to do business with independent billposters except upon prohibitive terms. Thus, this court said, at page 510 of its opinion:

> "* * * By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.
>
> "* * * Advertisers are not permitted to purchase 'stock' posters unless willing to have them displayed upon boards of members, *and independent billposters cannot purchase such matter at all.*"

It was clear from the allegations in the *Ramsay* complaint that the action of the conspirators in that case

prevented lithographers from shipping posters to the plaintiff solicitors and that the plaintiffs were thereby prevented from carrying on the business. Furthermore, the plaintiffs were engaged in shipping posters in interstate commerce and were thus engaged in interstate commerce. The immediate and direct effect of the defendant's acts was to destroy the interstate business of the plaintiff solicitors. Thus this court stated, at page 511 of its opinion:

> "* * * As a direct result of the defendants' joint acts, plaintiffs' interstate and foreign business has been greatly limited or destroyed."

Accordingly, this court was of the opinion that the activities of the defendants described in the *Ramsay* complaint imposed a direct and immediate restraint upon and complete control over the interstate movement of posters throughout the United States and Canada.

We shall show in this brief that the parties in the case at bar are not alleged in the complaint to have engaged in the shipment of posters in interstate commerce as was the case with the solicitors in the *Ramsay* case. We shall also show that, disregarding conclusions of law, the respondents in the case at bar are not alleged in the complaint to have placed any direct restraint upon the interstate movement of posters, nor are they alleged to have effected any such control over the interstate movement of posters as was described in the *Ramsay* complaint. In any event petitioners have not alleged, as did the plaintiffs in the *Ramsay* case, that respondents have prevented petitioners from se-

curing posters through the channels of interstate commerce.

General Nature of the Billboard Business.

The complaint in the case at bar shows that the outdoor advertising or billboard business consists of painting and posting advertisements on billboards and soliciting and performing contracts for such painting and posting of advertisements. The posting itself is a local business. The contract for posting is a contract for the performance of a local act and hence is not an interstate transaction. The solicitation, making and performance of such contracts are, therefore, not interstate commerce.

The outdoor advertising or billboard business exists to deliver a local service. The most analogous commercial enterprise that can be suggested for comparison is the office building or apartment house business. Advantageous locations must be secured and when secured a structure (billboard) erected, and then the space on the structure rented. ("Sold" is the word commonly used in this connection.) Since choice locations are scarce the competition for such locations is vigorous. In renting apartment house business—rooms—the owner must compete both as to service and price with other owners. The billboard operator must do the same with respect to the advertising space which he "sells" on his board.

The billboard business differs from other advertising services because the billboard operator does not move his service in commerce as does the publisher of a

newspaper or magazine. What he "sells" is space on a structure as immovable as the earth itself, so far as the concept of trade and commerce is concerned. It differs from other businesses in general in that no matter how greatly it may expand, no matter how many states it may extend into, it neither sells nor ships anything that can move in interstate commerce. The importance of this distinction should be especially observed in the case at bar because Foster and Kleiser Company is engaged in business in the states of Washington, Oregon, California and Arizona, and is alleged to have eastern offices in Chicago and New York City (R. 8), and to control over 90% of the outdoor advertising business, that is billposting business, of the Pacific Coast area. (R. 36.) Here is a business which is carried on extensively throughout the entire Pacific Coast area but yet the very nature of the business is such that it sells and ships nothing in interstate commerce.

In the course of his business the billposter leases or buys a real estate location, erects a billboard, and paints or posts an advertisement thereon. All that he sells is space upon which to display advertisements; and that space does not move. When the period of display is over the advertisement or poster is obliterated. There is nothing for him to move or transfer in order to conduct his business. The publisher, by contrast, moves his advertising service to the reader of his magazine and may do so in interstate commerce. (See and compare *Farmer's Guide Company v. Prairie Company* (1934), 293 U. S. 268.) The billboard operator,

however, fixes his advertisement at one place and if it is seen at all it is only because the reader has moved himself to a position where he can read the fixed advertisement.

Posters Produced in Other States are Used by Billboard Operators.

The billposter, like every person in business, uses many articles which have been produced in other states. Among these articles are advertisements in the form of lithographs or posters which have been manufactured or printed by persons located in states other than those which comprise the Pacific Coast area, principally in the states of Kentucky, Ohio and Illinois. (R. 10-11.) Petitioners place great emphasis on the circumstance that posters and lithographs which are pasted on billboards by the billposters are produced in other states, but they ignore entirely the fact that although the posters may be shipped into the Pacific Coast states for posting, when the posters are received by the billposter in the Pacific Coast states they have left the stream or flow of interstate commerce and they never re-enter it.

Petitioners' argument assumes that because posters are needed by those engaged in the billposting business in order to perform their posting contracts, and because the posters are manufactured principally in the eastern states, the execution or performance of the posting contracts makes the business itself interstate commerce. This conclusion does not follow. A local business does not become interstate in character merely because its conduct puts into action forces which tran-

scend state lines. As we shall presently demonstrate, the complaint affirmatively shows that the billposter has nothing to do with the shipping of posters, but that such shipment is made on direction of the advertiser or the lithographer. There is a hiatus between the transportation and the display of posters, which is not bridged by the circumstance that the transportation is one of the results of the execution of the posting contracts.

The Posting Contracts are Not Interstate Transactions, nor are they Agreements for the Shipment of Posters in Interstate Commerce.

As we have already stated, the pasting of a poster on a billboard is a local transaction and a contract for the performance of this service is not an interstate transaction. In making this statement we do not overlook the allegations contained in paragraphs II and III of the complaint (R. 4-8), wherein it is alleged that the posting contracts which the parties executed are in almost every case agreements to ship posters, stencils, designs and other materials in interstate commerce, that it is within the contemplation of the parties that the posters be painted on specific billboards, that until they are so pasted the posting contract remains incomplete, and that in the execution of such contracts the posters are shipped in interstate commerce.

The allegation that the posting contract remains executory and incomplete until performed is, of course, obvious and adds nothing to the complaint. However, the allegation that the posting contracts are agree-

ments to ship posters, if it be an allegation of fact rather than a conclusion, is so inconsistent with and repugnant to other allegations of the complaint as to be nugatory.

We refer in particular to those allegations of paragraph VI of the complaint, which read as follows:

> "The posting of a bill or poster upon a billboard involves three different parties and two different transactions; usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use. The advertiser then either personally, or through the agency, contracts with the plant owners in the localities which the advertiser desires to reach for the placing of these posters upon a stated number and class of billboards, and, in many cases, upon certain specified billboards. The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants. The lithographer usually is located in a different state from the advertiser who employs him to prepare the posters. Both the advertiser and the lithographer are usually located in different states from the plants upon which the posters are placed." (R. 17-18.)

We refer also to subdivisions (e) and (f) of paragraph VI (R. 16-17), which show that the posting contract solicited by the agencies is a contract "* * * for the display of poster and painted advertising matter * * *", and that such advertising matter is "* * * transported in interstate commerce *in accordance with*

the advertiser's instructions;". In subdivision (f) of paragraph VI (R. 16-17), it is alleged that the advertising agencies which solicit advertising contracts cause the copy and design for painted signs to be transported in interstate commerce "* * * from the office or studio of the advertiser or his agent, to operators of paint plants in various cities and towns * * *."

The foregoing quotations from paragraph VI of the complaint are specific in character and are at complete variance with and repugnant to the general allegations of paragraph III that the posting contracts are agreements for the shipment of posters. Paragraph VI affirmatively and specifically alleges that the contracts are agreements for the display of posters, and that the shipment of posters in commerce is one of the *"different transactions"* which precede the pasting of a poster upon a billboard. Paragraph VI also affirmatively and specifically alleges that the shipment of the poster in interstate commerce *is made by the lithographer pursuant to the direction of the advertiser,* and, by necessary implication, that the billposter has nothing whatsoever to do with the transportation of the poster.

The complaint therefore affirmatively shows, *as is the fact,* that the posting contract is merely an agreement between the billposter and the advertiser to paste or paint advertisements on billboards. The specific statement of the facts alleged in paragraph VI of the complaint relative to transactions which resulted in a movement of posters in interstate commerce of course controls the general, inconsistent and repugnant allegations contained in paragraphs II and III of the

complaint; and, accordingly, there is no appropriate allegation in the complaint that display contracts made by Foster and Kleiser Company required *as an essential or integral part thereof* the shipment of posters or lithographs or any other materials across state lines.

The rule of pleading that specific allegations control inconsistent general allegations is elementary. Inconsistent, repugnant or contradictory averments of matters of substance neutralize each other and render a pleading defective on demurrer.

49 *Corpus Juris*, p. 99;
Ryland v. Hollinger, et al., 8 Cir., 117 Fed. 216 (1902).

At page 219 the court said:

"* * * Again, the whole of the above-quoted allegation is so plainly repugnant to the other allegations of the same pleading that it is nullified. A pleading must be considered as a whole, and construed upon demurrer most strongly against the pleader wherever its allegations are doubtful or inconsistent."

Sternberg v. Wakonda Drainage and Levee District, 7 Cir., 33 Fed. (2d) 451 (1929), at p. 452.

Furthermore, where allegations of a pleading are inconsistent or contradictory, the pleader is bound by those most favorable to his opponent.

Wannamaker v. Edisto Nat. Bank of Orangeburg, 4 Cir., 62 Fed. (2d) 696 (1933).

At page 697 the court said:

"* * * There are certain inconsistencies in the allegations of the bill which have been resolved in

the following summary of the facts in accordance with the rule that, where allegations are contradictory, the pleader is bound by those most favorable to his opponent. 49 C. J. 119."

49 *Corpus Juris,* 119;

Ryland v. Hollinger, supra;

Johnson v. Steele, 59 Pac. (2d) 237, 243 (Ore. 1936).

Although interstate shipments of posters are shown by the complaint to be a frequent result of posting contracts, this circumstance does not render the contracts themselves interstate transactions. If interstate shipments are actually made, it is not because of any contractual obligation to that effect. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Petitioners argue that the agreements actuate the shipment of posters from one state to another (Brief, p. 46) and seek by this argument to show that the posting contracts are interstate transactions. The decisions of this court are against the petitioners.

In the case of *Moore v. New York Cotton Exchange,* 270 U. S. 593, there was before this court an alleged violation of the Sherman Act, involving the question whether contracts or agreements for the purchase and sale of cotton for future delivery, or the transactions to which they related, were subjects of interstate commerce because of the fact that they might give rise to interstate shipments. In that case, as in the one at bar, the defendant was engaged in a purely local business. At page 604 this court said: "The New York Exchange is engaged in a local business."

We have already shown that respondent Foster and Kleiser Company was and is engaged in a local business.

> "* * * Transactions between its members", continued the court in the *New York Cotton Exchange* case, "are purely *local in their inception and in their execution.* They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York, and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. *If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. Ware & Leland v. Mobile County,* 209 U. S. 405, 412-413. *The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. Engel v. O'Malley,* 219 U. S. 128, 139. See also *Hopkins v. United States,* 171 U. S. 578, 588, 590; *Anderson v. United States,* 171 U. S. 604, 615, 616."

In *Ware & Leland v. Mobile County,* 209 U. S. 405, which is approvingly cited in *Moore v. New York Cotton Exchange,* supra, and also in the *Blumenstock* case, supra (*Blumenstock Brothers Adv. Agency v. Curtis Publishing Co.,* 252 U. S. 436), this court held that brokers that take orders and send them to other

states for the purchase and sale of grain or cotton on speculation were not engaged in interstate commerce, and that the contracts themselves were not the subjects or instrumentalities of interstate commerce, because such contracts for sale or purchase did not require an interstate shipment. At page 413 the court said:

> "* * * The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State."
>
> * * * * * * *
>
> *"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases,* where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."*

Even assuming that in most instances the posters were actually shipped in interstate commerce to the Pacific Coast area, and assuming that the complaint so charges, nevertheless this circumstance does not render the posting contracts interstate transactions. (See *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169.)

The circumstance that the posting contracts are made between persons residing in different states does not transform the agreement into an interstate transaction.

In *Ware & Leland v. Mobile County,* 209 U. S. 405, at p. 413, the court said:

> *"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases,* where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."*
>
> *Blumenstock Bros. v. Curtis Publishing Company* (1920), 252 U. S. 436.

The *Blumenstock* case was an action under Section 7 of the Sherman Act against Curtis Publishing Company. Plaintiff was an advertising agency which desired to place advertisements with defendant Curtis Publishing Company. The complaint alleged that the publishing company refused to accept advertising from plaintiff unless plaintiff agreed to reduce the amount of advertising given to the owners and publishers of other magazines which were competing with the Curtis Publishing Company. The action of the Curtis Publishing Company was for the purpose of obtaining a monopoly of and control over advertising contracts. The plaintiff was engaged in business in Chicago and its advertisers were located throughout the United

States. Therefore, the contracts were made between persons residing in different states. Nevertheless, this court held that the action of the Curtis Publishing Company in seeking to monopolize such contracts did not constitute a violation of the Sherman Act and it affirmed the judgment of dismissal.

See also *Pacific Railways Advertising Co. v. Conrad* (1914), 168 Cal. 91, 94, 141 Pac. 916.

In the *Pacific Railways* case, the plaintiff advertising company refused to pay a business license fee exacted by a license ordinance of the City of Alameda. The advertising company sought an injunction restraining the chief of police from interfering with its advertising cards which it was displaying on railway cars operated by the Southern Pacific Company, claiming that the ordinance was an unauthorized interference with the interstate commerce which it was carrying on. In affirming the judgment for the city upon a general demurrer, the Supreme Court of California said at page 94:

> "Whatever may be the general nature of plaintiff's business, the particular business for the conduct of which a license fee was here exacted was a business conducted wholly within the state of California, and in no way involved the transportation of goods. *Mere contracts, though executed in several states, are not in and of themselves any part of interstate commerce within the meaning of the federal constitution.* (*Paul v. Virginia,* 8 Wall. 168 (19 L. Ed. 357); *Butler Bros. Shoe Co. v. United States Rubber Co.,* 156 Fed. 1 (84 C. C. A. 167); *International Text Book Co. v. Pigg,* 217 U. S. 91 (18 Ann. Cas. 1103, 27 L. R. A.

(N. S.) 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481); *Williams v. Fears,* 179 U. S. 270, (45 L. Ed. 186, 21 Sup. Ct. Rep. 128); *New York v. Knight,* 192 U. S. 21 (48 L. Ed. 325, 24 Sup. Ct. Rep. 202).)"

Petitioners admit, at page 40 of their brief, that the fact that billposting contracts are made between persons residing in different states does not transform the transaction into an interstate one, but claim that the cases which we have just discussed are not controlling because in the case at bar we have a nation-wide business involving interstate commerce. It is true that Foster and Kleiser Company conducts its business in several states and uses in its business materials which have at one time crossed state lines. It is also true that the products advertised are transported in interstate commerce. The posting of posters on billboards in the States of California, Oregon, Washington and Arizona can hardly be called a nation-wide business. Even if it were, however, that fact would be unimportant since the nature of the business is strictly local regardless of the number of states in which it is conducted. The circumstance that the products advertised are transported in interstate commerce has been disposed of as unimportant in the *Blumenstock* case (*Blumenstock Bros. Adv. Co. v. Curtis Publishing Company* (1920), 252 U. S. 436), where it appeared that the advertising contracts which the Curtis Publishing Company was charged with monopolizing and the advertising contracts of the agency with which the Curtis Publishing Company refused to do business constituted the chief method of presenting to the buying public articles sold in interstate commerce.

The Circumstance that Billposters Solicit Posting Contracts does not Place them in Interstate Commerce.

In paragraphs I and II of the complaint petitioners allege that they and Foster and Kleiser Company are engaged in the solicitation of advertising contracts (R. 4, 6.)

Advertising contracts, as we have seen, are contracts for the pasting of posters on billboards and are, therefore, local transactions. This being so, the solicitation of such contracts is also local and not interstate in character.

In distinguishing the *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, we pointed out that the advertising solicitors who were the plaintiffs in that action were engaged in interstate commerce because they were shipping posters in interstate commerce; and that a destruction of their business by the acts of the Bill Posters Association was a destruction of an interstate business and, therefore, a violation of the Sherman Act. Petitioners have attempted, at pages 42-46 of their brief, to bring this case within the principles of the *Ramsay* case by making it appear that the parties in the case at bar were advertising solicitors engaged in the same type of business as were the solicitors in the *Ramsay* case. In this endeavor to demonstrate that billposters are engaged in interstate commerce because they solicit advertising contracts, at pages 44-46 of their brief, petitioners quote at length from paragraph VI (R. 15-17 of the complaint), and argue that the allegations contained in that quotation show that

the parties in the case at bar were engaged in interstate commerce as advertising solicitors in the same manner as the solicitors who were plaintiffs in the *Ramsay* case.

There are at least two answers to this line of reasoning:

1. *A fair construction of the pleadings* requires the conclusion that the solicitation activities described in paragraph VI of the complaint are intended to refer to the work performed by the advertising agencies and are not intended to refer to the business of the billposters. This is borne out by an examination of paragraph V of the complaint (R. 14), where it is alleged:

> "Persons, firms and corporations who solicit outdoor advertising contracts, *and perform the activities in connection therewith, hereinafter set forth,* are referred to and called in the trade 'advertising agencies.'"

According to this quotation, persons who perform the activities *thereinafter set forth* are the advertising agencies. The billposters are not advertising agencies. Where are the activities of the agencies thereinafter set forth in the complaint? The next paragraph (i. e., paragraph VI) is the only place in the complaint where the activities referred to are thereinafter set forth, and consequently the activities described in paragraph VI are specifically identified as a description of the work performed by advertising agencies, and paragraph VI does not, as petitioners assert in their brief, describe the work performed by the billposters.

Paragraph VI also refers to the procurement of information from the association as a soliciting activity although petitioners concede in their complaint that they do not solicit such information from the association and that the agencies do. Furthermore, subdivisions (a) to (i), inclusive, of paragraph VI (R. 15-17) of the complaint, by frequent reference to dealings by the soliciting party and the plant operators make it plain that the plant operators are not the soliciting agencies referred to in that paragraph.

2. Even if the soliciting activities described in paragraph VI are sufficiently alleged to have been performed by the parties, nevertheless, they are not sufficient to show that the parties are engaged in interstate commerce. All the activities described in paragraph VI are local in character with the exception of the transportation of posters, which is described in subdivision (d) of that paragraph; but as subdivision (d) itself shows that the billposter is merely the consignee of the posters and that shipment is made by the lithographer, it is clear that the activities described in paragraph VI do not show that the billposters engaged in soliciting activities in such a manner as to make their business interstate commerce.

Petitioners have, therefore, failed to demonstrate that the business of the parties in the case at bar is identical with that of the solicitors in the *Ramsay* case (*Ramsay Co. v. Bill Posters Assn.* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167). In the *Ramsay* case the solicitors were engaged in shipping posters in interstate commerce. No similar allegation appears in the case at bar, and, since the complaint considered as a whole shows that the parties did no more than solicit,

obtain, and perform agreements for posting advertisements shipped by lithographers upon instructions of the advertisers, it is manifest that their business is not interstate in character as was the business of the solicitors in the *Ramsay* case.

This Court Has Held the Billboard Business to be Essentially Local.[14a]

In *Packer Corporation v. Utah* (1932), 285 U. S. 105, 52 S. Ct. 273, 76 L. Ed. 643, this court said of the outdoor advertising business at page 112:

> "* * * Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local. * * *"

This was also the view of the Supreme Judicial Court of Massachusetts in *General Outdoor Advertising Company v. Department of Public Works* (1935), 193 N. E. 799, 289 Mass. 149, the court stated at page 811:

> "* * * The outdoor advertising business of the several plaintiffs is intrastate and not interstate business or commerce. * * *"

The Scope of the Sherman Act Was Not Expanded by the Wagner Act or by this Court's Decisions Under the Wagner Act.

The Sherman Act has been before this court on many occasions since the Congress enacted the Statute

14a. Petitioners have argued in their brief at pp. 48-50, that two District Courts have held the billboard business to be interstate commerce because consent decrees were entered to that effect, although there is nothing whatsoever in the Record on this subject. Obviously a consent decree is no

in 1890. In every case in which the court has been called upon to consider the scope of the Sherman Act, it has held that the Act applies only to direct, immediate and unreasonable restraints of interstate trade and commerce, and does not apply to indirect, remote and reasonable restraints of such commerce.

Over forty years ago in the case of *Addyston Pipe & Steel Co. v. U. S.* (1899), 175 U. S. 211, this court, passing upon the Sherman Act, said at page 247:

> "* * * Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State."

In 1904 this court said in the case of *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, at page 623:

> "* * * In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But it is *only direct interferences* with the freedom of

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authority whatsoever. In any event neither decree has any bearing on the case.

* *Bausch Mach. Tool Co. v. Aluminum Co. of America*, 2 Cir. (1935), 79 F. (2d) 217, at 226;
Ware Kramer Tobacco Co. v. American Tobacco Co. et al., 178 Fed. 117, at 125-126, C. C. E. D. N. C. (1910);
Geo. Birrell, Inc. v. Fidelity & Casualty Co. (1922), 193 Iowa 860, 188 N. W. 26, at 31-32;
15 *U. S. C. A.* 16, Oct. 15, 1914, c. 323, sec. 5, 38 Stat. 731.

such commerce that bring the case within the exclusive domain of Federal legislation."

In 1913 in the case of *U. S. v. Patten*, 226 U. S. 525, this court said, at page 542:

> *"Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect."*

In 1922 this court said in the case of *Federal Club v. National League*, 259 U. S. 200, at pages 208-209:

> "The business is giving exhibitions of base ball, which are purely state affairs.
>
> * * * * * * *
>
> If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States."

In 1933 this court said, in the case of

Levering & G. Co. v. Morrin, 289 U. S. 103, at 107:

> "If thereby the shipment of steel in interstate commerce was curtailed that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held."

These decisions related to the scope of the Sherman Act and not to the constitutional power of Congress. See *Schechter Corp. v. United States*, 295 U. S. 495, where this court, after reviewing its decisions under

the Sherman Act on the subject of direct restraints, said, at page 548:

> "While these decisions related to the application of the federal statute, and *not to its constitutional validity,* the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one essential to the maintenance of our constitutional system."

Petitioners recognize in their brief, as did Judge Haney in his dissenting opinion (R. 108), that the Sherman Act applies only to direct restraints of interstate commerce; but it is claimed that the Sherman Act has been "expanded" in scope so as now to include activities which were formerly thought to have only an indirect restraint upon interstate commerce. This line of reasoning is particularly illustrated by Judge Haney's dissenting opinion, wherein he states (R. 97):

> "while the rule regarding the Congressional power over commerce has not been enlarged, the application of the exercise of the power, the anti-trust act, has been 'expanded,' as witness the Labor Board cases, cited in the majority opinion."

In contrast to this position is the opinion of the court below which holds that whatever may be the scope of the Wagner Act over local labor activities affecting interstate commerce, it is clear from the decisions of this court under the Sherman Act that the local activities described in the complaint at bar have only an indirect and remote effect upon interstate commerce and under this court's decisions are not prohibited by the Sherman Act.

No one will contend, of course, that all local activities are immune from the prohibitions of the Sherman

Act. It has been applied frequently to the conduct of employees engaged in production.

Loewe v. Lawlor, 208 U. S. 274;
Coronado Coal Co. v. United Mine Workers, 268 U. S. 295;
Bedford Cut Stone Co. v. Stone Cutters Association, 274 U. S. 37;
Local 167 v. United States, 291 U. S. 293, 297.

On the other hand, local activities not involving a direct or immediate restraint upon interstate commerce have been held to be outside the scope of the Sherman Act.

Blumenstock Bros. Adv. Agency v. Curtis Publishing Company, 252 U. S. 436;
Federal Club v. National League, 259 U. S. 200;
Moore v. New York Cotton Exchange, 270 U. S. 593;
Hopkins v. U. S., 171 U. S. 578.
Industrial Association v. United States, 268 U. S. 64;
United Mine Workers v. Coronado Coal Co., 259 U. S. 344;
United Leather Workers v. Herkert, 265 U. S. 457;
Levering & G. Co. v. Morrin, 289 U. S. 103.

The line of demarcation between those two classes of cases is an obvious one. Production and other local activities ordinarily have only an indirect and remote effect upon interstate commerce and are not within the reach of the Sherman Act. However, it is immaterial

whether the effect of an act is actually a direct or an indirect restraint upon interstate commerce if it is done for the purpose or with the intent of restraining interstate commerce, because, as soon as it appears that acts are done with a direct intent or purpose to restrain interstate commerce, the court has no alternative but to find a conspiracy (i. e., a purpose) to restrain interstate commerce in violation of the Sherman Act.

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295;

Levering & G. Co. v. Morrin, 289 U. S. 103.

Recently in reviewing the decisions, this court stated an additional reason why the labor cases in the class of the first *Coronado* case, supra, and the *United Leather* case, supra, were correctly decided. The Sherman Act was not aimed at all conspiracies to restrain interstate commerce but was aimed only at those which have for their purpose and effect the market control of a commodity.[15] Labor unions which engage in local activities falling short of this purpose or effect were held to be beyond the scope of the Sherman Act.

Apex Hosiery Co. v. Leader, 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913.

Although the *Apex* decision clarified the Sherman Act with respect to the scope of the Sherman Act's application to labor unions, no question was involved

15. Said the court: "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." *Apex Hosiery Company* case, 310 U. S. at pp. 500, 501.

in that case concerning what type of restraint constitutes a direct restraint of interstate commerce. This is so because concededly the restraint there involved was a direct restraint and this court's decision held in effect that even though the restraint was direct it was not a prohibited direct restraint.

Furthermore, the principle that acts relating to local transactions ordinarily create only an indirect restraint has not been confined to the labor cases.

Blumenstock Bros. Adv. Agency v. Curtis Publishing Company, 252 U. S. 436;
Federal Club v. National League, 259 U. S. 200;
Moore v. New York Cotton Exchange, 270 U. S. 593;
Hopkins v. U. S., 171 U. S. 578.

The principle having been established by this court that the Sherman Act applies only to direct restraints and that local acts such as those described in the complaint at bar ordinarily create only an indirect restraint, what basis is there for the argument advanced by petitioners and by the dissenting judge below that the passage of the Wagner Act by Congress and this court's construction of the Wagner Act have nullified this court's former construction of the Sherman Act and expanded the scope of the Sherman Act? We need not argue that the enactment of the Wagner Act did not change the scope of the Sherman Act, for it is too obvious to require argument that the two acts are different in purpose, application and scope, and that they are unrelated, notwithstanding that they stem from the same constitutional source.

It is suggested that in upholding the constitutionality of the Wagner Act this court approved congressional regulation of local acts on a new and expanded scale. (Petitioners' Brief pp. 53-61.) It is said that the Congress, in enacting the Sherman Act, intended to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. From this it is argued that if Congress has power to deal with local labor disputes which affect interstate commerce, it has like power and it intended to exercise it under the Sherman Act in dealing with restraints of local trade affecting interstate commerce.

The court below was not singular in rejecting this line of reasoning. (R. 93-96.) It has also been rejected by the Circuit Court of Appeals for the Third Circuit. *Apex Hosiery Co. v. Leader*, 108 F. (2d) 71, at pp. 80-81; affirmed 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913; although that court at one time had adopted the reasoning of petitioners. *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155, at 159.[16]

We do not understand that this court expanded the constitutional power of the Congress over local acts affecting interstate commerce when it upheld the Wagner Act in the Labor Board cases. (301 U. S. 1.) The Congress perhaps had undertaken to exercise its power over interstate commerce on a broader scale

16. The recantation of the Circuit Court of Appeals for the Third Circuit appears to have been prompted by the criticism of this line of reasoning by editors of many of the leading Law Reviews. See 51 Harvard Law Review, 169; 15 New York University Law Quarterly Review, 135; 39 Columbia Law Review, 1247; and also 49 Yale Law Journal, 518, at 525-527.

than ever before attempted; but in approving that exercise of power this court relied upon and expressly approved its earlier decisions under the Sherman Act on the subject of direct and indirect restraints. *Labor Board v. Jones & Laughlin,* 301 U. S. 1, 39-40.

In the *Jones & Laughlin* case, supra, a great steel industry which was engaged in interstate commerce was held to be subject to the Wagner Act because an interruption in the great steel business by labor disputes would create a serious obstruction to the free flow of commerce. In *Labor Board v. Fainblatt,* 306 U. S. 601, a garment shop engaged in interstate commerce was held to be subject to the Wagner Act notwithstanding that the volume of garments shipped in interstate commerce by the garment company was small when compared with the total volume of such articles which were shipped in interstate commerce.

In *Santa Cruz Fruit Packing Company v. Labor Board,* 303 U. S. 453, a fruit packing company shipping a substantial portion of its pack in interstate commerce was held to be subject to the Wagner Act. In *Edison Co. v. Labor Board,* 305 U. S. 197, a public utility serving important interstate transportation and communication facilities was held to be subject to the Wagner Act because the effect of industrial conflict in the plant of the utility would likely have an immediate and catastrophic effect upon the interstate facilities serviced by the utility. In *National Labor Relations Board v. Crowe Coal Co.,* 104 F. (2d) 633 (8th Cir.) (certiorari denied—*Crowe Coal Co. v. Labor Board,* 308 U. S. 584, 60 S. Ct. 107, 84 L. Ed.

86), 64% of the total output of the coal company was used as locomotive fuel by important interstate carriers, and the consequent effect of labor disputes on interstate commerce was held to be immediate and direct.

Petitioners rely upon the foregoing Labor Board cases (petitioners' brief pages 53-61) and claim that those decisions under the Wagner Act show that the Congress now has a broader power to regulate local transactions than it heretofore had; and that this broad power must be given expression under the Sherman Act. Thus, at page 57 of their brief they refer to the "theory of the *expanded* application of *Congressional power*". But obviously the Congress had no more power under the commerce clause when it enacted the Wagner Act in 1935 than it had when it passed the Sherman Act in 1890. We think that the decisions under each of the two statutes are entirely consistent.

The Congress in enacting the Wagner Act found that labor disputes were constantly recurring sources of injury and an obstruction to the free movement of interstate commerce. (See Section 1 of the Wagner Labor Act, Act of July 5, 1935, c. 372, 49 Stat. 449-457; 29 U. S. Code, Secs. 151-166, Public No. 198, 74th Congress.) It intended to deal comprehensively with such sources of obstruction. Therefore, labor disputes in industries engaged in interstate commerce have been held by this court to be subject to congressional regulation under the Act notwithstanding that the acts regulated would, if separately considered, be essentially local in character.

In the Sherman Act the Congress did not assert any attempt to control local activities as a recurring source of danger to interstate commerce, whereas in the Wagner Act the attempt of the Congress to reach local activities was obvious, since probably most labor disputes arise in manufacture or production. While it has been said that the Congress in enacting the Sherman Act intended to exercise all the power it possessed over restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce. *Apex Hosiery Co. v. Leader,* 108 F. (2d) 71, 310 U. S. 473, 60 S. Ct. 982, 84 L. Ed. 913 at 923; *Atlantic Cleaners & Dyers v. U. S.,* 286 U. S. 427, 76 L. Ed. 1204, 52 S. Ct. 607; nevertheless it is equally true that its power does not extend to local activities having no direct effect upon interstate commerce where there is no basis for assuming that regulation of the local acts is required to prevent restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce. It has never been thought that competitive practices occurring in intrastate commerce are within the scope of the Sherman Act unless they have an effect upon commerce more direct and immediate than the mere reduction of the opportunity of persons engaged in local commerce to use and to purchase goods which are produced in other states. (*Industrial Association v. United States,* 268 U. S. 64, at p. 80.)

It is not necessary to deal with the Wagner Act cases upon the theory that they express a new and expanded concept of Congressional power over local

activities affecting interstate commerce. There was nothing in prior decisions of this court under the Sherman Act which required the court to disapprove the Congressional control of productive operations of interstate industries where it was clear that such control was necessary to protect interstate commerce from the devastating effect of a cessation of productive operations. The Sherman Act decisions stand unimpaired by anything decided or said by this court in its decisions under the Wagner Act, and in an action for treble damages under Section 7 of the Sherman Act it is still necessary for the plaintiff to state facts showing that the acts complained of directly and immediately restrained interstate commerce.

A. Monopoly of the Billboard Business Could Affect Commerce in Only Two Ways: (1) Reduce the Opportunities of Competitors to Advertise Goods Sold in Commerce; (2) Reduce the Opportunities of Competitors to Use Posters Produced in Other States.

Since the billboard business consists of pasting and painting advertisements on signboards, and since the billposter does not ship anything in interstate commerce or have anything to do with the interstate shipment of the posters which he uses in his business, what basis is there for contending that the acts complained of directly restrained interstate commerce? We pass, for the moment, the allegations of paragraph X (R. 21-26) to the effect that threats were made with respect to the shipment of lithographs in interstate commerce, for we deal with those alle-

gations separately under Point Two of our argument. The remaining acts described in the complaint are all local in character and their only immediate and direct effect is to interfere with the ability of competitors to secure locations and posting contracts—activities which are essentially local in character.

A competitor whose billboard locations are interfered with, or who is unable to secure the volume of posting contracts which he would otherwise obtain if unhampered competitive conditions prevailed, undoubtedly has less opportunity to use posters in his business than would be the case if a monopoly of the business had not occurred. This reduction of opportunity applies to all articles which the billposter uses, as for example, paint, lumber, nails, trucks and gasoline, some of which are undoubtedly produced in other states. Petitioners, however, emphasize that the posters which are used in the business are produced in other states (R. 10-11); and that billboard advertising promotes the sale of goods, wares and merchandise throughout the Pacific Coast area. (R. 11.)

The question presented is whether a monopoly of the billboard business is *per se* in violation of the Sherman Act because it reduces the opportunity of competing billposters to advertise goods transported in commerce, and because it reduces the opportunities of competing billposters to use posters which are produced in other states. To state the question otherwise, the question is whether a monopoly of the business directly restrains interstate commerce when the only

effect upon such commerce is to reduce the opportunities of competing billposters to advertise goods transported in interstate commerce and to use posters which are produced in other states.

The question of what constitutes a direct or indirect restraint of commerce is not always easy to solve. The criterion is necessarily one of degree and cannot be determined by the application of mathematical or rigid formulas. (*Santa Cruz Fruit Pack. Co. v. National Labor Relations Board*, 303 U. S. 453, at 467, 58 S. Ct. 656, 82 L. Ed. 954.) Petitioners overlook this problem and seek to reach a solution based upon an assumed mathematical formula to the effect that wherever a business or related phases thereof substantially involves interstate commerce then and in that event local acts interfering with that business automatically impose a direct restraint upon interstate commerce. (Petitioners' brief, pages 40-52.) This formula is thought by petitioners to be laid down in the Wagner Act cases. (Petitioners' brief, pages 53-61.) They ask that this court apply the so-called formula to the complaint at bar and render a decision that a monopoly of the business of pasting bills on billboards directly restrains interstate commerce in posters because the billposter uses posters produced in other states and has less opportunity to use them by reason of the acts complained of. This reasoning is not only specious—it fails to consider the real nature of the effect upon commerce resulting from the acts of respondents which are described in the complaint.

A Monopoly of the Billboard Business Does Not Produce the Same Type of Effect Upon Interstate Commerce as Was Involved in the Labor Board Cases.

In the Labor Board cases the effect of a stoppage of productive operations upon the interstate phases of the businesses involved was unquestionably direct and immediate, and this court so held. Each of the industries involved in those cases was either engaged in interstate commerce or was engaged in directly servicing important interstate transportation and communication facilities. In the complaint at bar the billboard business is shown to be essentially local in its entirety.

Therefore, there is at the outset the distinguishing fact that the billboard business is in none of its phases interstate in character, whereas in all the Labor Board cases there was a regulation of a productive phase of a business producing goods for interstate commerce or of a business directly servicing interstate commerce. Furthermore, in the Labor Board cases the local acts regulated had an immediate and direct effect upon the volume of goods shipped in interstate commerce.

In the complaint at bar, as we shall presently demonstrate, competitive practices in the billboard business have no effect whatsoever upon the interstate business of the producers of posters or upon the volume of posters which are shipped in interstate commerce.

Finally, in the Labor Board cases businesses engaged in servicing interstate facilities were held to be

subject to Congressional regulation because the operation of the interstate facilities was dependent upon the operation of the local businesses which were regulated. (*Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197.) We shall show that the interstate business of the advertisers who use billposting as an advertising medium is not dependent for its successful operation upon the state of competitive conditions in the billboard business. The billboard business cannot be compared with a local enterprise servicing interstate transportation and communication facilities, such as the Consolidated Edison Co.

In passing, we concede the unfair character of the acts alleged in the complaint, but the moral quality of the activities complained of is no measure of whether they fall within the scope of the Sherman Act. A sit-down strike may be deplorable conduct but it is not forbidden by the Sherman Act. (*Apex Hosiery Co. v. Leader,* 60 S. Ct. 982, 84 L. Ed. 913, at pp. 932-933.) The maintenance in our federal system of a proper distribution between state and national governments of police authority, and of remedies, private and public, for public wrongs is of far-reaching importance and an intention to disturb the balance is not likely to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. (*Apex* case, supra.) *The question is not whether the acts are reprehensible but whether they directly restrain commerce among the several states.*

The Interstate Business of Advertisers Is Unaffected by Competitive Conditions in the Billboard Business.

First of all, the complaint does not show that the interstate commerce of advertisers using the billboard medium was in any way affected by the competitive conditions in the billboard business. Further, even if such a claim had been advanced, it is clear under the decisions of this court that the effect of such conditions upon the interstate commerce of the advertisers is too indirect and remote to fall within the scope of the Sherman Act. (*Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436.) In describing the allegations of the complaint in the *Blumenstock* case, this court stated at pages 438-439 of its opinion that the Blumenstock complaint made the following claim:

> "* * * that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; * * * that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; * * *"

Finally, it is not shown that the interstate business of the advertisers depends upon this particular form of advertising or upon the circumstance that one billboard operator or another has the monopoly of the billboard business. As in the *Blumenstock* case, supra, the interstate commerce of the advertiser goes on unaffected by the status of competitive conditions in the billboard industry.

The Interstate Business of the Producers of Posters Is Unaffected by Monopoly of the Billboard Business.

Usually the advertiser purchases the poster from the lithographer.[17] The lithographer does not care which one of several billposters displays the posters purchased by the advertiser. The lithographer's business is therefore unaffected by the circumstance that the advertiser decides to display the posters on the plant of one billposter in preference to the plant of another. An eastern lithographer produces and sells to the advertisers the same volume of posters in interstate commerce regardless of distant competitive conditions among billboard operators displaying the posters on the Pacific Coast. The posters produced in the eastern states are shipped to the states of Washington and Oregon, regardless of whether Foster and Kleiser Company or its competitors secure the posting contracts for the display of the posters. The destination of the posters within the states of

17. Paragraph VI of the complaint alleges: "The posting of a bill or poster upon a billboard involves three different parties and two different transactions; *usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use.*" (R. 17.)

Washington and Oregon may be Foster and Kleiser Company's office at Seattle or Portland rather than at the Seattle or Portland office of the petitioners; but even this slight effect upon the interstate destination of posters occurs, not because of any direct control of the alleged conspirators, but rather because local events in Washington and Oregon have reduced the opportunities of the petitioners to use posters locally.

In Any Event, a Monopoly Which Has No Greater Effect Upon Interstate Commerce Than to Reduce the Opportunities of Others Engaged in Local Operations to Use Goods Produced in Other States, Does Not Directly Restrain Interstate Commerce and Is Not Prohibited by the Sherman Act.

We have shown that the interstate transportation of the goods advertised and that the interstate business of the lithographers are entirely unaffected by the competitive conditions in the billboard industry on the Pacific Coast. However, let us assume arguendo that the complaint does appropriately allege that a monopoly of the billboard business on the Pacific Coast does have some effect upon the interstate commerce of either the producers of posters or the advertisers who use the billboard medium. Would such an effect be directly and within the scope of the Sherman Act?

The decisions of this court have already settled this question. A mere reduction of opportunity to use goods produced in other states may in turn reduce

the opportunity of the producer of those goods to ship them in interstate commerce, but the effect upon interstate commerce of this chain of events has never been considered to be direct.

In *Industrial Ass'n. v. United States*, 268 U. S. 64, this court said at page 80:

> "the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. *The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase.* The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote, * * *".

and at page 82 this court said:

> "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U. S. 436, the Curtis Publishing Company at-

tempted to corral all advertising contracts for itself by boycotting advertising agencies which dealt with competitors except upon the Publishing Company's terms. The immediate and direct effect of such action would have been to reduce the opportunities of competitors to transact their competing publishing business. This in turn would have reduced their opportunity to maintain their respective interstate circulations, but the court thought the effect of the action was too remotely related to interstate commerce to be within the scope of the Sherman Act.

The Sixth Circuit has taken the same view in the case of *Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co. Inc.* (1940), 109 F. (2d) 898, where a local ice cream business was held to be beyond the scope of the Sherman Act although in the course of the business articles produced in other states were used,—in fact the bulk of the raw materials used by the defendant were produced in other states.

It is suggested that a different rule should apply because Foster and Kleiser Company conducts its business in several states and makes thousands of posting contracts (petitioners' brief, 38-39). We recognize that the law is not indifferent to considerations of degree (Cardozo J., in *Schechter Corp. v. United States,* 295 U. S. 495, at p. 554); but a business which is essentially local does not become interstate because the local events occur in different states. The number of posting contracts made by the parties does not make the effect of the acts complained of any more direct. In the *Schechter* case, supra, the

government had produced ample evidence of the substantial number of transactions involved and of their ultimate effect upon interstate commerce, but this court unanimously held that these considerations are not sufficient to give Congress jurisdiction over local acts when the ultimate effect of the acts upon commerce occurs through an indirect chain of events.

To summarize our position on this phase of the case, we repeat that the chain of events described in the complaint at bar is indirect in character. The manufacturer of posters is not prevented from producing or shipping them by distant local events in other states. The interstate movement of posters is not claimed to have been stopped or even interfered with. It is not shown to have been directly controlled. There is no claim that the volume of posters in interstate commerce was in any way affected. Any variation of the destination of the posters within the states of Washington and Oregon is but a slight effect upon the interstate movement of the posters and occurs, not because of any direct control of the alleged conspirators, but rather because local events in Washington and Oregon have reduced the opportunities of the petitioners to use posters locally. The interstate movement of the goods advertised is in no way affected by competitive conditions in the billboard industry.

Finally, if there is any effect of a monopoly of the billboard business upon the interstate commerce of the lithographer or the advertiser, then an effect produced by this chain of events is entirely indirect. To

subject to Congressional regulation local activities producing an effect so slight and indirect would lay the foundation for the Congress to regulate every local business using articles produced in other states. The authority of the Federal Government cannot be pushed to such an extreme, either under the Sherman Act or under our Constitution.

The Court Below Was Correct in its Opinion that the Complaint Shows no Intent or Purpose to Place Unlawful Restraints Upon Interstate Commerce.

The opinion of the court below states that according to the complaint the conspirators did not intend to restrain interstate commerce by the commission of the local acts described in the complaint. (R. 90, 92.) Petitioners complain that this was error because the complaint shows an actual restraint upon interstate commerce and the intent of the conspirators is therefore immaterial. (Petitioners' brief, 14-36.) The dissenting Judge below also criticized the observations of the majority on the subject of intent. (R. 106-107.) In addition, petitioners state that they have alleged intent generally and that is sufficient on demurrer. (Petitioners' brief, p. 32.)

We concede that intent may be averred generally, Rule 9(b) Federal Rules of Civil Procedure, but petitioners have not done that. They have done no more than allege that respondents intended to place unlawful restraints upon interstate commerce[18] (R. 36, 37),

18. The language of the averment is as follows:
"That the defendants, * * * have been engaged in a conspiracy and combination to place unlawful restraints upon the trade and

which is about as effective as alleging that respondents intended to violate the Sherman Act. An allegation of intent thus framed is no more than a conclusion of law. If petitioners desire to come within the principles of Rule 9(b) of the Federal Rules of Civil Procedure they might have stated what was intended in terms of fact and not in terms of conclusions. For example, if respondents had intended to destroy the interstate business of lithographers dealing with independent bill posters by destroying the billboards of independents displaying the posters produced by such lithographers, a statement of those facts would support a conclusion that the respondents intended by ther local acts to place restraints upon interstate commerce. However, there are no facts stated in the complaint at bar to support the conclusion that respondents intended to place restraints on interstate commerce by the commission of local acts.

The dissenting judge below was right when he said that if an actual direct restraint is accomplished the intent with which either interstate or intrastate acts are done is immaterial (R. 107); but the majority opinion did not say that intent is material under

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commerce in posters and lithographs between the several states of the United States * * * and in furtherance of said conspiracy and combination, did place unlawful restraints upon the trade and commerce in posters and lithographs and painted display advertising between the several states of the United States, by the commission of various and sundry acts, specific instances of which are as follows, to-wit:

"That defendants formulated, adopted and practiced the policy of interfering with all competitors of any of the defendants, and particularly the defendant Foster & Kleiser Co., for the purpose of preventing said competitors from carrying on their lawful business and the aforesaid interstate trade and commerce in outdoor advertising in competition with the defendants, and particularly in competition with the defendant Foster & Kleiser Co."

such circumstances. On the contrary, the majority pointed out that the Sherman Act may be violated notwithstanding that the ultimate objective of the conspirators is to monopolize intrastate business or commerce (R. 89-90), and the majority cited as authority the case of *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 47. The observations of the court below on the subject of the ultimate intent of the conspirators were thought to be necessary only because this court had so often announced the rule that acts which *do not* directly restrain interstate commerce are nevertheless in violation of the Sherman Act if the conspirators commit them for the purpose of interfering with interstate commerce. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.* (1927), 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916; *Coronado Coal Company v. United Mine Workers of America* (1925), 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Loewe v. Lawlor* (1908), 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, at p. 502. See also *Schechter Corp. v. United States* (1935), 295 U. S. 495, at p. 547, 55 S. Ct. 837, 79 L. Ed. 1570. Conspiracies to interfere with interstate commerce are in direct violation of the Sherman Act even if the acts in furtherance of the conspiracy when separately considered do not directly restrain interstate commerce.

The court below applied these principles to the complaint at bar and held accordingly that the local acts complained of did not directly restrain interstate trade or commerce. The question then remained whether the local acts were nevertheless in violation

of the Sherman Act upon the ground that they were committed with a purpose or intent to place restraint upon interstate commerce. The allegation that the acts were done for the purpose of placing restraints upon commerce (R. 36-37) is, as we have just pointed out, ineffectual because it alleges no more than a conclusion of law and must therefore be disregarded on demurrer. The specific allegations of the complaint show that the local acts were intended to spend their force locally, that there was no intent or purpose to secure results from these local acts in other states, and that any expenditure of the force of these local acts in other states was incidental, remote and unintended. Therefore, there was no basis for finding a violation of the Sherman Act by applying the principles announced by this court in the cases of *Coronado Coal Company v. United Mine Workers of America*, 268 U. S. 295; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37.

POINT TWO.

EVEN IF THE COMPLAINT APTLY ALLEGES AN UNLAWFUL CONSPIRACY TO CONTROL THE SHIPMENT OF POSTERS IN INTERSTATE COMMERCE, NEVERTHELESS NO FACTS ARE STATED SHOWING THAT PETITIONERS OR THEIR CUSTOMERS WERE UNABLE TO OBTAIN POSTERS, OR THAT PETITIONERS WERE IN ANY WAY DAMAGED BY ANY ACTS IN FURTHERANCE OF THE ALLEGED CONSPIRACY.

The complaint charges that respondent Foster and Kleiser Company, and its co-conspirators, entered into a scheme to monopolize the billboard business on the

Pacific Coast by preventing independents, and their customers, from obtaining posters in interstate commerce. (R. 19, 20.)

A conspiracy which seeks to accomplish its purpose by placing direct restraints upon the interstate shipment of posters is unquestionably forbidden by the Sherman Act notwithstanding that the conspirators themselves are not engaged in interstate commerce. (*Ramsay Co. v. Bill Posters Association* (1923), 260 U. S. 501, 67 L. Ed. 368, 43 S. Ct. 167.)

Further, in a civil action for damages suffered because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. Therefore, we must inquire whether the complaint contains sufficient allegations of fact showing that this alleged conspiracy was made effective to the injury of petitioners.

The overt acts in furtherance of this conspiracy to prevent competitors from obtaining posters in interstate commerce are stated at pages 23 and 24 of the Record. In some respects they resemble the overt acts described in the *Ramsay* case. (*Ramsay Co. v. Bill Posters Association* (1923), 260 U. S. 501.) Certainly they constitute the closest approach which petitioners make to the statement of a cause of action against the respondents.

In the *Ramsay* case the conspirators adopted the following means for carrying out the purposes of the combination. These means are described at page 510 of the court's opinion:

"* * * By threats of withdrawal of patronage, manufacturers have been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms.

"* * * Advertisers are not permitted to purchase 'stock' posters unless willing to have them displayed upon boards of members, *and independent billposters cannot purchase such matter at all.*"

It is clear from the foregoing allegations in the *Ramsay* complaint that the action of the conspirators in that case prevented lithographers from shipping posters to the plaintiffs' solicitors and that the plaintiffs were thereby prevented from carrying on their business. Furthermore, the plaintiffs in that case were solicitors who were engaged in the business of selling posters "* * * and were engaged in interstate commerce." (260 U. S. 501, at p. 509.) Therefore, a destruction of the solicitors' interstate business by the combination and monopoly described in the *Ramsay* complaint violated the Sherman Act regardless of whether the destruction was accomplished by local or interstate means.

The business of the parties in the case at bar is not an interstate business, and since a monopoly of their business does not *per se* violate the Sherman Act, it is incumbent upon the petitioners to show that respondents by threats and coercive means placed unreasonable and direct restraints upon the interstate shipment of posters to petitioners' injury. An examination of the pertinent allegations set forth in the

complaint (R. 23-24) will show, however, that petitioners have not, as did the plaintiffs in the *Ramsay* case, supra, alleged that respondents had prevented petitioners from securing posters or lithographs through the channels of interstate commerce.

Before we examine the record we refer briefly to several of the more flagrantly erroneous statements in petitioners' brief as to what the complaint alleges on this subject.

For example, petitioners state at page 6 of their brief that the association refuses to buy posters from lithographers who sell posters for display on the billboards of independents. *There is no such allegation in the complaint.* Again, at page 10 of their brief petitioners state:

> "B. The lithographers refused to furnish their posters, lithographs, and services to C. E. Stevens Company because Foster & Kleiser Co., the Bureau and the Association threatened to boycott them if they dealt with such independent, thus restricting shipments and service to the advertising public;"

There is nothing in the record to support this statement.

Similar misstatements may be found in petitioners' brief at page 17 where it is stated that advertisers were forced to deal with respondents and not with petitioners; at page 18 of their brief where it is stated that respondents directly prevented posters from being shipped to petitioners; at page 33 of their brief where petitioners state that the conspirators brought

pressure upon lithographers which resulted in the refusal of the lithographers to ship posters to petitioners; and, finally, at page 39 of their brief, where petitioners state that respondents forced lithographers and advertisers to cease sending posters and lithographs to petitioners, and to send these posters and lithographs to respondent.

We say that the foregoing statements in the brief are incorrect statements because an examination of the record (R. 23-24) will show that the complaint alleges no more than the following: That the conspirators, "by and through action of said association", threatened to refuse and did, in fact, refuse to *post* lithographs if the manufacturers of the lithographs sold or furnished lithographs for posting upon independent plants, or if the lithographers furnished samples of posters to independent plants. It is claimed that this action was taken for the purpose of coercing and intimidating, and that it did, in fact, coerce and intimidate lithographers, and that it was for the further purpose of hindering and obstructing independents, including the plaintiffs, from securing lithographs and posters and samples thereof. Under the subject of "damages" it is claimed: "* * * that thereby the said independents were obstructed and hindered in their business, and prevented from giving a full and adequate outdoor advertising service to their customers * * *."

In this connection it should be observed that the complaint does not allege that the conspirators themselves made the threats described in the complaint or

that the conspirators themselves refused to post lithographs. The association referred to is not claimed to be a conspirator because throughout the complaint, and particularly in paragraph X (R. 21-26) petitioners refer to "said association and said conspirators".

It is not alleged by whom the so-called threats were made nor to whom they were made. The threats and refusals are *indefinitely* alleged to have been done "* * * by and through action of said association * * *", although the association is not alleged to be in the business of posting, or in the business of buying or selling posters. Finally, the allegation that this action was taken for the purpose of "* * * coercing and intimidating, and it did, in fact, coerce and intimidate lithographers * * *" is a *mere conclusion* of the pleader. *Murphy v. Mitchell,* 249 Fed. 499, D. C., N. D. N. Y., 1918; 49 C. J., pp. 61-62. This is particularly true because the mere allegation of threats of refusal and actual refusal to post advertisements without showing to whom or by whom the threats were made, is too indefinite and evasive to support the general conclusion of "coercion and intimidation" which follows it. Moreover, although it is claimed that the action was taken for the purpose of preventing independent plant owners, including the plaintiff, from securing lithographs and posters, *nowhere is it alleged that petitioners or any other independent were actually prevented from securing lithographs or posters.*

True, as we have stated above, petitioners claim in their brief that paragraph X of the complaint (R.

21-26) shows that independents, including petitioners, were prevented from securing posters. However, petitioners have been *unwilling to state this in their complaint,* notwithstanding that they have had three opportunities to amend their complaint. The allegation that the independents were obstructed in their business is certainly a conclusion and as such is too indefinite and vague to justify the claim that petitioners or other independents are thereby shown to have been prevented from securing in interstate commerce the posters and lithographs which they needed for the conduct of their business.

It should be further noted that although the complaint alleges that the action of the conspirators was taken for the purpose of coercing and intimidating lithographers, and that it did, in fact, coerce and intimidate lithographers, nevertheless the complaint does not state what the lithographers were coerced or intimidated from doing. And further still, although the complaint states, (R. 23) that the action of the conspirators was taken for the purpose of preventing independent plants from securing posters and samples thereof, NOWHERE IN THE COMPLAINT IS IT STATED THAT THE INDEPENDENTS WERE UNABLE TO SECURE ANY POSTERS OR LITHOGRAPHS.

Finally, although it is alleged that the action of the conspirators was taken to prevent independents "* * * *including the plaintiff* * * *" from securing posters (R. 23), yet in *the same sentence* it is stated that the effect of the action was to obstruct independ-

ents (*and here plaintiffs are not mentioned as being included*). Certainly by referring in one portion of the sentence to independents "including the plaintiff" and by referring to the independents alone in another portion of *the same sentence,* petitioners have not alleged that they are included among the independents so obstructed. We have not overlooked the allegation in paragraph VIII (R. 19) that the term "independent" includes the appropriate plaintiff, but this allegation does not assist petitioners where, as in the case at bar, they have contrasted in the same sentence the term "independents" with the term "independents, including the plaintiff". The inclusion in the one case implies an exclusion in the other case.

Petitioners should not be permitted to get this action to trial by innuendo and general conclusions in their complaint, without specifically stating facts which are necessary to a statement of a cause of action, and which petitioners are apparently not willing to allege in a verified pleading. The manner in which the facts have been pleaded gives every indication that upon this phase of the case the petitioners are resorting to a sham pleading. If petitioners had or could have secured contracts for posting which they were prevented from performing by reason of their inability to secure posters in interstate commerce, it would have been a simple matter to have alleged this claim and to have alleged also the particular acts which were committed by respondents to prevent the petitioners from securing the posters which they needed to conduct their business. No such claim has been presented in the complaint at bar; on the contrary, peti-

tioners have resorted to mere general and sweeping charges of the obstruction of the business of independents generally, *they have not even alleged that the independents were unable to secure posters,* and, in any event, they have neither alleged a direct restraint upon the shipment of posters to themselves nor plead any facts which give rise to a logical inference that the petitioners were or could have been damaged by any direct or unreasonable restraint upon the interstate shipment of posters.

Judge Haney in his dissenting opinion in the court below (R. 109) relies upon the allegation in the complaint that "the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained." That this is a conclusion of law which in no way assists petitioners in the statement of their cause of action is, we submit, too obvious to require a discussion or citation of authority.

We now refer briefly to the principles of law applicable to the indefinite and conjectural type of pleading relied upon by petitioners in the case at bar. These principles have been laid down by the courts in other cases involving substantially the same facts.

In the case of *Shurtz v. Foster & Kleiser Company et al.,* 29 F. Supp. 162 D. C. N. D. Calif. at pages 163, 164, the court in passing upon identical allegations said:

> "As pointed out by counsel for defendants, the only allegations in the complaint which come

near stating a cause of action are those alleged in paragraph XXII and XXIII, where it is alleged generally that the independents, including plaintiff, were by threats obstructed and hindered in their business. But 'this is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. The plaintiff must show injury to business or property. Keogh v. Chicago & Northwestern Ry. Co. et al., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The fact that plaintiff is engaged in like business is not material, unless he has been injured directly, aside from injury common to all'. Ebeling v. Foster & Kleiser Co., 12 F. Supp. 489, 490.

"Testing the complaint by the law as laid down in the books, it is apparent that it does not state a claim upon which relief can be granted. See Foster & Kleiser Co. v. Special Site Sign Co., supra; Ebeling v. Foster & Kleiser Co., supra; Alexander Milburn Co. v. Union Carbide & Carbon Corp., 4 Cir., 15 F. (2d) 678, 680; Gerli v. Silk Ass'n. of America, D. C. 36 F. (2d) 959, 960."

In *Ebeling v. Foster & Kleiser Co.*, 12 F. Supp. 489, D. C., W. D., Wash., N. D., 1935, the court said at page 490:

"Conclusions or argumentative pleading tenders no issue of fact. This is a private controversy, not a prosecution for the common good, and overt acts must be pleaded upon which to ground the statutory liability to the plaintiff. The plaintiff must show injury to business or property. Keogh v. Chicago & Northwestern R. Co. et al., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. The fact that

plaintiff is engaged in like business is not material, unless he has been injured directly, aside from injury common to all. It is not sufficient to allege things forbidden by the Sherman Anti-Trust Law, USCA, title 15 sections 1-7, 15 note. *He must allege nature and character of the injury.* American Sea Green Slate Co. et al. v. O'Halloran et al. (C.C.A.) 229 F. 77; Noyes v. Parsons et al. (C.C.A.) 245 F. 689; Alexander Milburn Co. v. Union Carbide & Carbon Corp. et al. (C.C.A.) 15 F. (2d) 678. The wrongful act must be specific and the natural and probable effect of the combination and conduct with relation to plaintiff's business, and this *must be facts directly related to the defendants' conduct from which damages are logically and legally inferable and not merely conjecture;* and must be by the exercise of existing power, not merely that the power existed. Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., 248 U. S. 55, 39 S. Ct. 38, 63 L. Ed. 123."

It is never enough to plead obstruction to business generally. Plaintiff must show with definiteness and certainty wherein he was injured in his business or property.

Alexander Milburn Co. v. Union Carbide & Carbon Corporation, 15 F. (2d) 678 (C.C.A. 4); at page 680:

"* * * It is very doubtful whether, without the subparagraphs, the declaration could be held a sufficient statement of a cause of action to constitute the basis of a recovery; *for it is not sufficient that the declaration be framed in the words*

of the statute, or that it allege MERE CONCLUSIONS of the pleader. *It must describe with definiteness and certainty the combination or conspiracy relied on, as well as the acts done which resulted in damage to plaintiff, and, in doing so, must set forth the substance of the agreement in restraint of trade, or the plan or scheme of the conspiracy, or the facts constituting the attempt to monopolize.* 19 R. C. L. 87; Cilley v. United Shoe Mach. Co. (C.C.), 152 F. 726; Rice v. Standard Oil Co. (C.C.), 134 F. 464."

Gerli v. Silk Ass'n of America, 36 F. (2d) 959, at 960 (Dist. Ct. S. D. New York):

"* * * *It is not enough to allege something forbidden by the Anti-Trust Laws* (15 U.S.C.A. sections 1-7, 15) and to claim general damage resulting therefrom. (American Sea Green Slate Co. v. O'Halloran (C.C.A.), 229 F. 77, 79), but *the complaint* asserting a statutory cause of action *must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff's business or property within the meaning of the statute.*"

Our discussion upon this phase of the case disposes of similar allegations in paragraph X (R. 23-24) to the effect that "By and through said association or associations, advertisers were intimidated by the said association plants and the said conspirators * * *," in that the association plants and conspirators threatened to and did refuse to post posters of advertisers who made contracts with independent plants. It is not stated what the advertisers were intimidated from doing and there is no allegation showing that adver-

tisers were unable to secure posters or were unable to have them posted either by the so-called independent plants or by the so-called association plants. There is a general conclusion at the end of paragraph X (R. 26) that independents were obstructed and hindered in their business by the alleged acts of the conspirators which are set forth in paragraph X; but, for the reasons hereinabove stated, this general conclusion is too indefinite to constitute a sufficient pleading on the subject of damages.

POINT THREE.

ASSUMING ARGUENDO THAT THE SHERMAN ACT WAS VIOLATED BY RESPONDENTS' ALLEGED CONSPIRACY TO CONTROL ADVERTISING AGENCIES AND SOURCES OF NATIONAL BUSINESS, NEVERTHELESS THE COMPLAINT STATES NO FACTS SHOWING THAT PETITIONERS SUFFERED DAMAGE BY ANY ACT IN FURTHERANCE OF THE ALLEGED CONSPIRACY TO CONTROL THE SOURCES OF NATIONAL BUSINESS.

The claim is made that respondents conspired to monopolize the billboard business on the Pacific Coast, by controlling the business at its source through control of agencies and other selling organizations. (R. 20.) Much of the complaint is devoted to a recital of the acts which are supposed to have made this conspiracy effective. (R. 21-36.) Petitioners in their brief urge that these allegations show a nation-wide agreement between two powerful combines in the business and that this portion of the conspiracy was interstate in conception and execution. (Petitioners' brief, page 12.)

The complete answer to this phase of the case is that the control of the national business at its source is not in and of itself a violation of the Sherman Act because posting contracts are not interstate transactions and a monopoly thereof is not *per se* a violation of the Sherman Act.[19] Further, the complaint does not show that national posting contracts were controlled, or attempted to be controlled, at their source by placing direct restraints upon the interstate shipment of posters, as for example, by preventing advertisers from securing posters in interstate commerce. The allegations which most closely approach such a claim have been discussed already in our treatment of the charge that the conspirators by and through the association made threats and refusals (R. 23-24), and we have already shown why these allegations avail petitioners nothing.[20] The remaining allegations unsuccessfully attempt to claim that respondent Foster and Kleiser Company by virtue of its relationship with eastern sources of national business has attained a monopoly of national posting contracts.

There is no claim, other than the charge of threats and refusals heretofore disposed of,[21] that Foster and Kleiser Company achieved its dominant position in the national posting business by controlling or directly restraining the interstate movement of posters. If the interstate movement of posters was in any way affected by Foster and Kleiser Company's volume of national posting business that was an indirect and

19. See pages 15-62 of this brief.
20. See pages 62-74 of this brief.
21. See pages 62-74 of this brief.

incidental result and any such restraint of interstate commerce has not been forbidden by the Sherman Act.[22]

But let us assume arguendo that it would violate the Sherman Act for respondents to control advertising agencies and other sources of national business. Does the complaint show that respondents committed any acts in furtherance of such a plan which did in fact effect, or could have effected, control of advertising agencies and other sources of national business?

The term "advertising agencies" is not defined in the complaint, but the duties and functions of national advertising agencies are matters of common knowledge. Advertising agencies are fiduciaries of their clients' advertising appropriations and they have the obligation to allot advertising to newspapers, magazines, radio and billboards as the agencies in their good judgment see fit.

There is no claim in the complaint that the conspirators controlled any advertising agency or were in a position to direct any advertising agency where to place its billboard business. It is said, however, that practically all large advertising agencies are, and since 1918 have been, members of the National Outdoor Advertising Bureau, Inc., which is "* * * engaged in the business of aiding and assisting its stockholders and others employing its services in soliciting and executing contracts for national outdoor advertising." (R. 27.)

22. See pages 48-59 of this brief.

The agencies became members of the Bureau by virtue of a stock option agreement which provided in part that the Bureau was to be the members' sole agent for placing outdoor advertising. (R. 27-28.) Petitioners do not claim that respondents had anything to do with the preparation or execution of the membership agreement nor is it claimed that respondents had anything to do with inducing agencies to become members of the Bureau.

Petitioners have advanced the theory that agencies were compelled to become Bureau members because the conspirators paid a commission of 16⅔% to agencies which were members of the Bureau and 10% to non-Bureau members. (R. 35.) However, the petitioners have carefully omitted to allege that the same services were performed for the 10% commission as were performed where the commission of 16⅔% was paid. The allegation that a higher commission was paid to Bureau members than to non-Bureau members is of no effect whatsoever in the absence of any allegation that non-Bureau members performed the same services for 10% as were rendered by Bureau members for 16⅔%. The fact of the matter is that the 16⅔% commission was paid to agencies which rendered a complete service, including the preparation of designs, whereas the 10% commission was paid where the billposter prepared designs himself and performed other services of like character. This undoubtedly explains why petitioners have carefully omitted to claim that the same services were rendered by those who received a 10% commission as were rendered by those who received a higher commission.

The complaint next charges that the Bureau made a contract with The Thomas Cusack Company whereby the Cusack Company would execute all billboard business obtained by the Bureau. (R. 30.) It is not claimed that respondents had anything to do with this contract, and petitioners merely state in their complaint that such a contract happened to be in existence. (R. 30.)

Then it is stated that through an arrangement between the Cusack Company and Foster and Kleiser Company all national business secured through the Bureau and executed by the Cusack Company would be sublet to Foster and Kleiser Company in so far as such contracts were to be executed in the Pacific Coast area. It can hardly be contended that this agreement with the Cusack Company controlled the agencies, but we need not decide that question because the complaint shows on its face that the Cusack agreement was dissolved in 1925. (R. 33.) This action was filed on February 27, 1933, which is eight years after the dissolution of the Cusack agreement, and therefore the execution of the Cusack agreement and acts pursuant thereto are, on the face of the complaint, barred by the applicable statute of limitations, which in no event exceeds three years. *Remington's Revised Statutes of Washington,* Sec. 159 (2) and 165; *Foster & Kleiser Co. v. Special Site Sign Co.,* 9 Cir. 85 F. (2d) 742 at 750-753.

Furthermore two of the petitioners (plaintiffs in the Second and Third Counts) are alleged to have been incorporated in 1928—more than three years after the last of the acts alleged to have been committed.

On August 24, 1925, a new agreement is claimed to have been made between the Bureau and the General Outdoor Advertising Company, under which the Bureau was made the agent of the General Company to solicit contracts for national outdoor advertising to be executed upon plants owned and operated by the General Company. (R. 33.) However, General Outdoor Advertising Company did not operate any plants on the Pacific Coast (R. 33) so that that part of the contract which relates to advertising to be executed by the General Company has no bearing in this case.

The complaint goes on to allege that the Bureau's contract with the General Company also provided that the Bureau was made the agent of the General Company to solicit billboard contracts which "* * * *at the option of the Bureau* * * *" were to be executed upon plants not owned or operated by the General Company. (R. 33.) In other words, the Bureau in soliciting business for the General Company had the option to determine what plants would be used on the Pacific Coast, where the General Company did not operate.

Since it is not claimed that the conspirators had any control over the Bureau, and since the placing of Pacific Coast business was left to the option of the Bureau, it is obvious that the complaint shows on its face that business obtained by the Bureau for the General Company was under the control of the Bureau and its member agencies and was in no wise controlled by the General Company or by the conspirators.

The contract between the Bureau and the General Company had the further provision that all advertis-

ing contracts obtained by the Bureau to be performed by the General Company should be forthwith assigned by the Bureau to the General Company. (R. 33.) However, the General Company did not operate on the Pacific Coast (R. 33), and, therefore, any contracts to be performed by the General Company would not be performed on the Pacific Coast. In addition, the General Company is not named as a conspirator. Consequently, the allegation that contracts to be performed by the General Company were forthwith assigned to the General Company by the Bureau is unimportant.

Finally, it is said that in the practical operation of the contract, billboard agreements obtained by the agency members of the Bureau were assigned to the General Company, and it is also said that all the contracts to be executed on the Pacific Coast were executed by Foster and Kleiser Company. (R. 33-34.) But the complaint does not allege that the agencies were controlled by the conspirators or that the Bureau was controlled by the conspirators, and we have seen that the Bureau *at its option* could place the Pacific Coast business where it chose. How then can petitioners successfully claim that the complaint shows that Foster and Kleiser Company controlled this source of national business? The complaint shows on its face that the Bureau had the option to place the business where it chose and that in the practical operation of its option it apparently selected the plants of Foster and Kleiser Company in preference to those of competitors of Foster and Kleiser Company.

We have not overlooked the allegation that Foster and Kleiser Investment Company, a corporation

wholly owned by respondent Foster and respondent Kleiser, owned 50,000 shares of the common stock of the General Outdoor Advertising Company and that respondent Kleiser was a director of the General Company. (R. 32, 33.) It is not claimed that the General Company was a conspirator, nor does it appear from the complaint that the respondents had any control over the General Company or any agreement with it concerning the placing of business on the Pacific Coast; and, in any event, the complaint shows on its face that the Bureau and not the General Company had the option to place the billboard business where it chose on the Pacific Coast, so it matters little what relationship, if any, Foster and Kleiser Company had with the General Company.

The National Solicitors.

There are two sources of national business—the agencies and national solicitors. (R. 15.) We have shown that petitioners can claim no damage by virtue of any control by respondents over the advertising agencies, because the complaint shows on its face that respondents, in fact, obtained no control over the agencies or the national business which they developed. What about the other source of national business, the solicitor?

In 1917 the solicitors formed a company known as "Poster Advertising Co. Inc." (R. 26.) It is said that through Poster Advertising Co. Inc. and the association the conspirators prevented solicitors from placing business on independent plants. (R. 35.)

However, Poster Advertising Co. Inc. went out of existence in 1924 (R. 32), so that its activities are shown on the face of the complaint to be barred by limitations. *Remington's Revised Statutes of Washington,* Sec. 159 (2) and 165; *Foster & Kleiser Co. v. Special Site Sign Co.,* 9 Cir. 85 F. (2d) 742 at 750-753.

We next consider whether the complaint shows that petitioners can base any recovery upon the activities of the association and its licensed solicitors.

Petitioners Can Base No Recovery Upon Association Activities.

The complaint is almost unintelligible on the subject of "the association." It states that "the association" referred to is the Outdoor Advertising Association of America, Inc., a corporation (R. 21), then describes a number of predecessor associations (R. 21) and proceeds to make charges against "the association or associations" (R. 21-26) without indicating which association is meant.

We can clarify the complaint by eliminating from our consideration the various predecessor associations inasmuch as they were consolidated on March 25, 1927, into the Outdoor Advertising Association of America, Inc. Upon the face of the complaint the statute of limitations bars any of the acts of the predecessor associations prior to consolidation, because in any event the applicable statute of limitations is not in excess of three years.[23] Therefore, it is necessary to consider only the activities of the Outdoor Advertising Associa-

23. See page 78 of this brief.

tion of America, Inc., which came into existence in March, 1927, as a consolidation of its predecessor associations. (R. 21.)

It is said that membership in the association since consolidation, which we shall assume means membership in the Advertising Association of America, Inc., consists of separate display plants located in separate communities throughout the country (R. 21-22); that there is only one membership for each separate community (R. 22); that the membership is denominated a franchise (R. 22); and that the number of votes held by each member is equal to the number of membership plants operated by such member. (R. 22.)

Foster and Kleiser Company has, according to the complaint, 600 memberships and is second only to General Outdoor Advertising Company, which holds 1,000 memberships. (R. 34.) Foster and Kleiser Company has substantially all the membership plants which are operated on the Pacific Coast. (R. 22.) Respondent Kleiser was a director, and, for many years, was president of the association. (R. 34.) It is suggested that the conspirators controlled and dominated the association and the operations and functions thereof because Foster and Kleiser Company had 600 memberships therein and General Outdoor Advertising Company had 1,000 memberships therein. (R. 34-35.)

Membership in an association does not violate the federal anti-trust laws unless the purposes and activities thereof are forbidden by the anti-trust laws. We therefore next inquire whether the purposes and activities of the association are such as to be within the pro-

hibition of the Sherman Act. We also inquire whether petitioners have stated facts showing that they were damaged by the association activities. We pass the allegations that the conspirators by and through "said association", made threats and refusals which are said to have obstructed independents (R. 21-22), as we have shown elsewhere in this brief[24] that no recovery can be based upon those allegations.

The remaining association activities are claimed to have been these: the licensing of solicitors to solicit advertising exclusively for association members (R. 25); refusal of association members to execute advertising contracts which did not come through licensed solicitors of the association (R. 25); the maintenance of a statistical service for which non-members were charged $2500.00 per year, and for which members were charged a lesser sum (R. 25); and the refusal by association members to execute posting contracts in which independents were to participate. (R. 24-25.)

Again we point out that this shows no direct restraint upon the shipment of posters in interstate commerce, nor any control by the conspirators of the interstate movement of posters in commerce. The complaint, however, fails in other respects as well.

The licensing of association solicitors to secure orders from association members in no way restrains commerce in posters nor does it interfere with the activities of the so-called independents in securing posting contracts for themselves. The charge that as-

24. See pages 62-74 of this brief.

sociation members refused to post advertising unless secured by licensed solicitors is rendered nugatory by other allegations on the face of the complaint to the effect that respondent Foster and Kleiser Company obtained a large volume of its posting business through the Bureau which was not a licensed solicitor and through the advertising agencies which were not licensed solicitors; and it will be recalled also that the so-called conspirators are not shown to have had any control over the placing of advertising by the agencies or by the Bureau.[25] The complaint shows on its face, therefore, that association members did accept advertising from sources other than the so-called licensed solicitors.

Furthermore, any acts of the licensed solicitors are, on the face of the complaint, barred by the Statute of Limitations because their group (known as the Poster Advertising Company, Inc. (R. 26), was merged into the General Outdoor Advertising Company in 1924 (R. 32) and apparently played no part in the so-called conspiracy thereafter.

The maintenance of statistical data by the association is not claimed to have violated the anti-trust laws. Petitioners complain, however, because the association charged $2500.00 per year to make that service available to non-members. (R. 25.) It is claimed that this charge was prohibitive (R. 25), but the allegation that the charge was prohibitive is a mere conclusion not supported by any facts. The circumstance that asso-

25. See pages 74-87 of this brief.

ciation members obtained the service at a cheaper price is immaterial since the association members bore all the burdens and liabilities in connection with the maintenance of the service and should, in the nature of things, be entitled to obtain the service at a lesser price than that to be paid by non-members.

Although it is charged that the association plants refused to handle posting contracts in which independents were to participate (R. 24-25) *there is no claim that the conspirators refused to execute any contract in which petitioners were to participate.* Therefore, petitioners have failed to show any injury and damage to themselves resulting from these alleged activities of the association.

In conclusion upon this point it is clear that none of the alleged acts of the association involved any direct control of the interstate movement of posters by the alleged conspirators. No control over the agencies is shown. No control over the Bureau is shown. The placing of agency business in territories not serviced by the General Outdoor Advertising Company is shown upon the face of the complaint to have been at the option of the Bureau over which the conspirators had no control. Finally, *to the extent that the allegations regarding the association are definite or intelligible, the petitioners are not shown to have been unable to secure posters nor are they shown to have lost any contracts by virtue of the so-called association activities.*

Therefore, from all that appears in the complaint, and it is the fact, the placing of Pacific Coast business

with Foster and Kleiser was directed by the agencies and the advertisers whom they represented. There is no showing in the complaint that either the advertisers or their agencies surrendered any control in the placing of contracts to respondents or their unnamed associates in the alleged conspiracy.

POINT FOUR.

DAMAGES CAUSED BY LOCAL PREDATORY ACTS ARE NOT RECOVERABLE BECAUSE SUCH ACTS WERE IN NO WAY RELATED TO THE ALLEGED CONSPIRACY TO RESTRAIN TRADE IN POSTERS.

The complaint recites a variety of so-called predatory acts, all local in character and having for their object the interference with billboard locations of competitors. (R. 36-44.) Petitioners claim that these activities interfered with the execution of their existing contracts and rendered the procuring of new contracts partially or wholly impossible. (R. 41-42.) This is an allegation of injury to petitioners themselves, and is the only allegation of fact in the complaint showing that petitioners themselves were injured by reason of the activities of respondents which are described in the complaint.

These various predatory acts are alleged to have been committed in furtherance of a conspiracy to place unlawful restraints upon interstate trade and commerce in posters. (R. 37.)

We have already discussed the point that the billboard business is local in character and that a monopoly thereof does not *per se* directly restrain

interstate commerce in posters.[26] In that discussion we show that the effect of local transactions upon commerce is indirect and remote and that the Sherman Act is not violated merely by obtaining control of the billboard business which is essentially local in character.

What we said in that discussion applies with equal force here. Interference with advertising sites locally does not prevent any bill poster from obtaining posters in interstate commerce. True, it takes away a bill poster's opportunity to use, and his incentive to purchase, posters but it in no way interferes with the freedom of the lithographer to sell and ship, or of the billposter to buy posters. It has no effect upon the interstate business of the advertiser or the lithographer. If there is any effect upon interstate commerce, it is, under the decisions of this court, clearly incidental, indirect and remote.

Industrial Ass'n of S. F. v. U. S. (1925), 268 U. S. 64, at p. 80;

United Leather Workers v. Herkert (1924), 265 U. S. 457;

United Mine Workers v. Coronado Coal Co. (1922), 259 U. S. 344;

Levering & G. Co. v. Morrin (1933), 289 U. S. 103.

Petitioners argue, however, that these local acts are part and parcel of a conspiracy to restrain commerce in posters and that therefore damages sustained by such local acts are recoverable as having been caused

26. See pages 15-62 of this brief.

by acts in furtherance of the conspiracy, and that this is so regardless of whether the local acts themselves directly restrain interstate commerce. This theory is wholly untenable.

Damages, in order to be recoverable under the Sherman Act, must be caused by acts having some reasonable relation to the furtherance of a violation of the Sherman Act. Where that violation consists of a conspiracy to restrain commerce in posters, the acts which caused the damage must be in furtherance of such a conspiracy or must have a reasonable relation to the furtherance of such conspiracy. *It is not sufficient to allege a prohibited conspiracy to restrain interstate commerce in posters and then to plead acts which, if accomplished, would not result in furtherance of the conspiracy.* By the device used by petitioners it would be a simple matter to get a case to trial under the Sherman Act where, as here, the only acts committed are local in character, simply by alleging that they were committed pursuant to a conspiracy to restrain interstate commerce.

In the case at bar the only acts which have caused damage to petitioners are local acts which could not possibly have been in furtherance of the alleged conspiracy to place restraints upon commerce in posters, because they are wholly unrelated to the furtherance of such a conspiracy, and damages caused thereby are not recoverable under the Sherman Act.

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, at 754 (certiorari denied, 299 U. S. 613).

As the court below quite correctly stated (R. 90):

> "* * * By the device of alleging a conspiracy to restrain interstate trade in posters and lithographs without alleging that this conspiracy was effective and worked to the damage of appellants, they cannot recover damages arising from the alleged conspiracy to prevent the acquisition and use of billboards and to obtain a monopoly of advertising contracts, activities intrastate in character, when it is clear that the purpose of the conspiracy as a whole is a monopoly of intrastate business."

POINT FIVE.

IN ANY EVENT THE CIRCUIT COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THE SECOND AND THIRD COUNTS OF THE COMPLAINT.

This point is not raised in the petition for certiorari. Further, it was not expressly decided by the Circuit Court of Appeals because the decision of the Circuit Court of Appeals upon the major issue of the application of the Sherman Act made it unnecessary to determine the point. However, if it should be held by this court that the decision of the Circuit Court of Appeals, in so far as it involves the construction of the Sherman Act, should be reversed then it will be necessary to determine whether the second and third counts state a cause of action.

While we assume that this court would refer these questions back to the Circuit Court of Appeals for its decision we herewith submit a brief outline of what is involved so that it will not be overlooked that we rely

upon this point in addition to the points previously discussed.

In the first count of the complaint it is alleged (R. 3):

> "That plaintiff alleges that the C. E. Stevens Company is the parent company, and that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are subsidiaries of the parent company, functioning principally as branch offices of the parent company, * * *"

By this allegation, which is incorporated by reference in each of the second and third counts, the plaintiffs therein have shown themselves to be agents of C. E. Stevens Company, the plaintiff in the first count.

The term "branch offices" can have but one meaning. A branch office is commonly understood to be a local arm of the main office. Compare *Remington's Revised Statutes of Washington,* Sec. 3221, defining the term "branch banks" as follows:

> "The term 'branch bank', where used in this act, means any office of deposit or discount maintained by any bank or trust company, domestic or otherwise, other than its principal place of business, regardless of whether it be in the same city or locality."

The pleader meant to convey the same meaning, that is to say, a place of doing business other than the principal place of business, for in paragraph III it is alleged with reference to the business of the respondent Foster and Kleiser Company (R. 8):

> "* * * said defendant Foster & Kleiser Co., has its *principal place* of business in the City of San Francisco, and *branch offices* at Seattle and Tacoma, * * *"

The term "branch office" has been judicially determined to mean a place "where the corporation conducts its general business in the same way that it carries on its busines at its principal office". See *Ft. Smith Lumber Co. v. Shackleford,* 171 S. W. 99, 115 Ark. 272 (1914). *Webster's New International Dictionary* defines a "branch" as a "local subordinate office".

It is also beyond dispute that those who are employed to operate the branch offices are agents. The circumstance that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are corporations does not, of course, alter their agency status. In conducting branch offices for the C. E. Stevens Company they are fully as much its agents as if those branch offices were operated by natural persons.

The question therefore presented is whether plaintiffs in the second and third counts have any right to join with their principal, C. E. Stevens Company, in prosecuting this action, as no damage is alleged except as to the business and property of C. E. Stevens Company, for whom they are alleged to have acted as agents, and for those damages C. E. Stevens Company is itself suing in the first count.

No Facts are Stated Supporting any Claim that Plaintiffs in Second and Third Counts were Damaged in their Separate Corporate Capacity.

It may be conceded, of course, that an agent may recover damages to his own, as distinguished from his principal's, property. Thus, if an agent were using his own automobile in the course of his principal's business, the agent would be entitled to recover damages for any wrongful injury to that automobile by a third person.

See 3 *C. J. S.*, p. 138:

> "The general rule is that an action will lie in favor of an agent against a third person for any injury or trespass committed by such third person against the agent *personally* while acting in the course of his employment."

In the case at bar, however, the complaint affirmatively shows that plaintiffs in the second and third counts were conducting the business of the parent company—and no business of their own. The only injury claimed is loss of business and profits. Since the business was the parent company's, the profits lost would have accrued to it, and not to the agent companies which were conducting its branch offices. No facts are stated which could support a claim that the agent companies which operated the branches sustained any personal loss.

The Cause of Action Cannot be Split Between the Parent Company and its Agents, the Two Subsidiaries.

That this condition which we now urge is well founded can be demonstrated, we think, if the court will look forward to the time of trial. Assume that the principal defendant, Foster and Kleiser Company, answers this complaint, putting in issue (a) the facts alleged by C. E. Stevens Company, the parent company, claimed by it to amount to a monopolization of interstate commerce in posters and lithographs; and (b) the claims made by C. E. Stevens Company in respect of the amount of damage it claims to have sustained in consequence of the conspiracy alleged. Assume that upon the issues thus made a trial is had and the stage is reached when the court is confronted with the task of instructing the jury: First, as to what facts will create liability in favor of C. E. Stevens Company and against Foster and Kleiser Company, the principal defendant; and second, the rules by which the jury must assess the amount of the damage in favor of C. E. Stevens Company and against Foster and Kleiser Company if the jury finds that liability exists. Obviously in such circumstances the court must instruct the jury to return *one verdict* representing all the *damage sustained by the parent company,* which is the owner of the entire business claimed to have been injuriously affected by the alleged wrongful acts of the respondents. It is elementary, of course, that *there can be no splitting of causes of action. Either the parent company can make one entire recovery or it can make none at all.* The

court having so instructed, as it must, that if any recovery at all is allowed it must be allowed in one lump sum in favor of the parent company whose business was damaged, by what rule can the court then go forward and instruct the jury that it can additionally return a verdict for some amount in favor of one agent (C. E. Stevens Tacoma Company) and for some other amount in favor of the other agent (C. E. Stevens Company of Oregon) when no injury to them personally is shown?

It seems too plain for argument that at the close of all the evidence, if any liability at all is established under the allegations of this compaint, it must be a liability in favor of C. E. Stevens Company, the parent corporation, and against the principal defendant, Foster and Kleiser Company. Full indemnity having thus been made by a verdict returned on the first cause of action, how can it be possible for the jury to then return verdicts on the second and third causes of action in favor of the two subsidiaries which, as stated in the complaint, never functioned except as branch offices or agents of the party recovering the verdict on the first cause of action?

Remington's Revised Statutes of Washington, Sec. 179, provides:

> "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law."

And the following section, 180, states the exceptions as being executors, administrators, guardians, trustees

of an express trust, etc. *There is no provision to the effect that an agent may maintain a suit to recover damages suffered by his principal.*

The new Rules of Civil Practice for the District Courts of the United States contain identical provisions in Rule 17 (a), which reads:

> "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *."

The rule thus stated is, of course, but a restatement of a well settled rule of practice that has always been observed.

It is well settled that it is the principal and not the agent who must sue for damages sustained by the principal.

See:

Denman v. Richardson, 284 Fed. 592 (1921) (D. C. W. D. Washington S. D.);

Chatfield v. Clark, 51 S. E. 743 (1905), 123 Ga. 867;

Galveston, H. & S. A. Ry. Co. v. Stockton, 38 S. W. 647 (1897) (Tex. Civ. App.).

Hence, assuming for the purposes of argument that C. E. Stevens Company, the parent company, has stated a cause of action against Foster and Kleiser

Company, it is entirely clear the respondents cannot be held liable to the parent company for all of the damages sustained by it and additionally held liable for some portion of the same damages sustained by the parent company through its two subsidiaries acting as its agents. The second and third counts were properly dismissed.

CONCLUSION.

Upon the grounds and for the reason urged in this brief, it is now submitted that the judgment of the court below must be affirmed.

Dated, San Francisco, California,
November 8, 1940.

Respectfully submitted,

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Attorneys for Respondents, Foster and Kleiser Company (a corporation), George W. Kleiser, Restop Realty Company (a corporation), and Gerald O'Neil.

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SUPREME COURT OF THE UNITED STATES.

No. 41.—OCTOBER TERM, 1940.

C. E. Stevens Company, C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon, Petitioners,
vs.
Foster & Kleiser Co., George W. Kleiser, P. Foster, et al.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1940.]

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case the petitioners filed a complaint[1] in the District Court for ~~Northern California~~ Western Washington, under § 7 of the Sherman Act,[2] for triple damages for alleged violation by the respondents of §§ 1 and 2 of the Act.[3] The respondents demurred to the amended complaint for failure to state a cause of action. The District Court treated the demurrer as a motion to dismiss and dismissed the complaint. The Circuit Court of Appeals affirmed the judgment.[4]

The question presented is whether the complaint alleges damage to the petitioners consequent upon a conspiracy to create a monopoly in the business of bill posting in the Pacific Coast region and to accomplish that monopoly by restraining interstate commerce in the transportation of posters.

The relevant allegations of the complaint may be summarized.

The petitioner C. E. Stevens Company is engaged in the business of outdoor advertising, which is the business of procuring locations

[1] The suit was brought by the C. E. Stevens Company and two subsidiaries. The complaint is in three counts, the first setting forth the claim of the parent company, and each of the others the claim of one of the subsidiaries, against the respondents. Save as to the locale of the plaintiffs' business, and the amount of damages demanded, the counts are substantially alike. We shall refer to the first count as the complaint. The District Court did not pass on the question of the propriety of the joinder of the several causes of action, which was raised by the demurrer, and we express no opinion upon it.

[2] Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. A. § 15.

[3] Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209; 15 U. S. C. §§ 1 and 2.

[4] 109 F. (2d) 764.

and erecting structures thereon for the posting of bills and the painting of signs. Its business is conducted in Washington and other states. More specifically, the petitioner's activities are the soliciting, entering into, and execution of contracts for poster service for the display of posters, painted bulletins, and wall displays. These contracts are secured from advertisers, their representatives, and advertising agencies located throughout the United States and constitute agreements whereby the parties are to ship posters, lithographs, designs, stencils, etc., interstate with the purpose that the posters or lithographs shall be placed upon billboards and the other material used for painting signs on locations controlled by the bill posting company. Foster & Kleiser Co., one of the respondents, is engaged in the same business in the Pacific Coast states and elsewhere. The other respondents are connected with and controlled by Foster & Kleiser Co. or its subsidiary, Restop Realty Co., the latter being in the business of owning, holding, and leasing property for outdoor advertising sites on the Pacific Coast.

The usual routine of the business is that the advertiser, directly or through an agency, contracts with a lithographer for making posters. The advertiser, either personally or through an agency, contracts with a bill posting company in the desired locality for the placing of the posters. The advertiser then forwards the posters to the bill poster or orders the lithographer to forward them. Foster & Kleiser Co. is operating under numerous contracts thus made.

Foster & Kleiser Co. formulated and entered into a plan, scheme, and conspiracy with others for the purpose of monopolizing all branches of the outdoor advertising business in the Pacific Coast area and preventing petitioner and other independents, so-called, from engaging in that business and securing and executing contracts therefor and from securing posters for use therein. The purpose of the conspirators was to prevent lithographers from supplying posters to independents, including petitioner, or to advertisers who were customers of petitioner and to prevent independents from securing adequate sites for the display of posters.

The bill asserts that there is an association of paint plant[5] operators and poster plant operators, known as "Outdoor Advertising Association of America, Inc.", of which the owners of separate

[5] A plant is a group of sign locations owned or controlled by one bill poster in one city or community.

plants located in separate cities are members. There is one membership for each municipality. Voting rights are according to the number of separate plants owned and operated by each voting member. Foster & Kleiser Co. has some six hundred plants with concomitant voting rights. By virtue of its voice in the management of the association, and pursuant to the conspiracy, it caused the association to threaten to refuse, and to refuse, to post lithographs if the manufacturers thereof sold or furnished them for posting by independent plants or furnished samples of posters to independent plants, with the aim and effect of coercing and intimidating the lithographers so as to prevent and hamper the petitioner and other competitors of the association's plants, and of the respondents, from securing samples or lithographs. Actual obstruction and hindrance of the independents, including the petitioner, resulted. Pursuant to the conspiracy, the association and the conspirators threatened to refuse, and have refused, to post posters and lithographs for advertisers if they patronized or made contracts with independent plants. In addition, the conspirators refused to execute any portion of national contracts for outdoor advertising if any part of the work had been executed, or was to be executed, by an independent plant. The movement in interstate commerce of posters, lithographs, and designs for outdoor advertising was thus attempted to be monopolized, was monopolized, and was unreasonably restrained by the respondents.

Other allegations are made with respect to agreements brought about by the Foster & Kleiser Co. and other bill posting concerns to exclude the petitioner and other independents from participation in the national business of advertising. It is also alleged that the respondents resorted to various other illegal and unfair acts and means in the petitioner's locality in an effort to prevent petitioner from obtaining sites for posting lithographs and displaying advertising signs, as part of the same general conspiracy and for the same ultimate purpose. We do not further set out these allegations because enough has been said to indicate the question on which the case turns.

The respondents conceded in the court below, and here, that the complaint charges a conspiracy in restraint of interstate commerce, within the purview of the Sherman Act, in view of the decision in *Ramsay Co.* v. *Associated Bill Posters Association*, 260 U. S. 501.

The court below, however, agreed with the respondents that the complaint fails to allege that the conspiracy, so far as it affected

interstate commerce, was effective to injure petitioner, since there was no allegation that respondents' conduct prevented the petitioner from obtaining or receiving any posters. It thought the allegations of damage to petitioner's business were directed to the local acts of the respondents rather than to any restraint of interstate commerce in posters; and, as purely local activities were the gravamen of the complaint, no violation of the Sherman Act was sufficiently charged. This, upon the principle that local activities pursued without intent to hinder or restrain interstate commerce, although they indirectly affect it, cannot flow from or sustain a finding of conspiracy to interfere with or restrain such commerce.

The petitioner urges that the complaint charges a general conspiracy to monopolize the bill posting business on the Pacific Coast and, as one of the means of such monopoly, to restrain interstate commerce in posters contributing to the resulting injury of the petitioner. It insists that the court below was wrong in construing the complaint as charging a monopoly of local business not intended to affect interstate commerce.

We hold that the complaint alleges a conspiracy in violation of §§ 1 and 2 of the Sherman Act. The object of it is to monopolize or to restrain trade in the bill posting business on the Pacific Coast, and in aid of that purpose, to restrain interstate commerce in posters; and the complaint sufficiently alleges that such monopoly and restraint inflicted damage upon the petitioner.

As we have said, the complaint alleges that the petitioner solicits contracts for poster advertising as does the respondent, Foster & Kleiser Co. The petitioner is thus in competition with Foster & Kleiser Co. in the effort to obtain contracts which call for the interstate shipment of posters for their execution. The complaint adequately charges a conspiracy to restrain the transportation of posters in interstate commerce, in aid of the attempted monopoly. It also charges other means and acts, local in character, with the same aim. The conspiracy, with its effect on interstate commerce, is alleged to have caused the petitioner great expense and loss of profits; to have restrained and prevented petitioner from establishing a business in San Francisco, "all to the great injury and damage of plaintiff". The pleading further alleges that the respondents' acts were injurious to the petitioner, excluded petitioner from fair competition, and charges that because of petitioner's inability to compete with respondents, petitioner "has been damaged in that